TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1918

No. [redacted]238

SOUTHERN PACIFIC COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF ARIZONA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARIZONA.

FILED AUGUST 12, 1917.

(26,083)

(26,083)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 616.

SOUTHERN PACIFIC COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF ARIZONA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARIZONA.

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a In the Supreme Court of the State of Arizona.

Cause No. 1529.

SOUTHERN PACIFIC COMPANY, a Corporation, Appellant,

vs.

STATE OF ARIZONA, Appellee.

TRANSCRIPT OF RECORD.

Appearances.

For the Appellant:

C. W. Durbrow, F. B. Austin, J. C. Forest.

For the Appellee:

Wiley E. Jones, Attorney General; R. Wm. Kramer, Ass't Att'y General; G. W. Harben, Ass't Att'y General.

1 ABSTRACT OF RECORD.

In the Superior Court of the State of Arizona in and for the County of Maricopa.

STATE OF ARIZONA, Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, Defendant.

Complaint.

Plaintiff for cause of action complains and alleges.

I.

That defendant is a corporation duly organized and existing under and by virtue of the laws of the State of Kentucky, and is duly authorized to transact business within the State of Arizona.

II.

2 That on the 20th day of March, 1914, there was promulgated, under the authority and seal of the Arizona Corporation Commission in the matter of the rate to be charged Campbell's United Shows by the Southern Pacific Company and the Arizona Eastern Railway Company for transportation in Arizona,

Docket No. 165, an order to show cause before the Arizona Corporation Commission, on or before 10 o'clock A. M., Monday, March 23rd, 1914, why the said Arizona Corporation Commission should not issue special rate authority compelling defendant to publish, on one day's notice, a rate for the transportation of Campbell's United Shows, consisting of eighteen cars and to furnish such equipment as may be necessary in the State of Arizona at the rate of $3.00 per mile from Tucson, Arizona, to Maricopa, Arizona, a copy of which order is hereunto attached, marked exhibit "A," and, by reference made a part of this complaint.

III.

Agreeable to the order of the Arizona Corporation Commission as alleged in Paragraph II. of this complaint, defendant appeared before it, at the time and place therein specified, and, after a full and fair hearing it was ordered that defendant transport the cars, property employees and attendants of Campbell's United Shows, and to extend to said Campbell's United Shows the usual privileges in the movement of advance agents, from Tucson, Arizona, to Maricopa, Arizona, at a rate of $3.00 per train mile for the entire service, as appears by the opinion and order of the Arizona Corporation
3 Commission, promulgated under its authority and seal on the 25th day of March, 1914, a copy of which opinion and order is hereunto attached, marked exhibit "B," and, by reference, made a part of this complaint.

Plaintiff further alleges that defendant's motion for a rehearing of the said order, promulgated under the authority and seal of the Arizona Corporation Commission on the 25th day of March, 1914, was denied, as appears from a copy of said order which is hereunto attached, marked exhibit "C," and, by reference, made a part of this complaint.

IV.

Plaintiff further alleges that said order of the Arizona Corporation Commission, promulgated under its authority and seal on the 25th day of March, 1914, commanding defendant to transport the cars, property, employees and attendants of Campbell's United Shows from Tucson, Arizona, to Maricopa, Arizona, and to extend to said Campbell's United Shows the usual privileges in the movement of advance agents for a total amount not to exceed $3.00 per train mile for the entire service, was not complied with, in pursuance of which the Arizona Corporation Commission, upon the petition and information of G. P. Bullard, Attorney General for Arizona, a copy of which is hereunto attached, marked exhibit "D," and, by reference,
4 made a part of this complaint, issued a citation to defendant to appear before it on the 13th day of April, 1914, at 10 o'clock A. M., and show cause why it should not be punished for contempt, as in said petition alleged, a copy of which order to show cause is hereunto attached, marked exhibit "E," and, by reference, made a part of this complaint; that at the hearing of said order on the 13th

day of April, 1914, to show cause why it should not be punished for contempt of the Arizona Corporation Commission, it was adjudged that the order, promulgated under its authority and seal on the 25th day of March, 1914, had not been complied with, in consequence of which, and as a result of the hearing conducted on the 25th day of April, 1914, the defendant was declared in contempt of the said Arizona Corporation Commission, and, on the 16th day of May, 1914, adjudged to pay a fine in the sum of Fifteen Hundred ($1,500.00) Dollars, to be paid and satisfied on or before June 1st, 1914, or, in default of the payment of the same before said date, to be proceeded against for the collection of the same by the Attorney General, as provided by law, a copy of which order adjudging the defendant in contempt of the Arizona Corporation Commission is hereunto attached, marked exhibit "F," and, by reference, made a part of this complaint.

V.

Plaintiff further alleges that the said order of the Arizona Corporation Commission, promulgated under its authority and seal on
5 the 16th day of May, 1914, has not been complied with by defendant and that it has refused and still continues to refuse to pay plaintiff the sum of Fifteen Hundred ($1500.00) Dollars imposed upon it by the Arizona Corporation Commission for a contempt of its order of March 25, 1914.

Wherefore, plaintiff prays that it recover and have judgment against the defendant, Southern Pacific Company, a corporation, for the sum of Fifteen Hundred ($1500.00) Dollars, together with its costs and disbursements in this behalf expended and for such other and further relief that seems just and meet to the Court in the premises.

G. P. BULLARD,
Attorney General.
LESLIE C. HARDY,
Assistant Attorney General.

EXHIBIT "A."

Before the Arizona Corporation Commission.

Docket No. 165.

6 In the Matter of Rate to be Charged Campbell's United Shows by Southern Pacific Company and Arizona Eastern Railroad Company for Transportation in Arizona.

Order.

To Southern Pacific Company, Tucson, Arizona; to Arizona Eastern Railroad Company, Tucson, Arizona:

You are hereby commanded to appear before the Arizona Corporation Commission at its office in the State House, Phoenix, Arizona, on

or before 10 o'clock A. M., Monday, March 23, 1914, to show cause why this Commission should not issue Special Rate Authority as follows:

Special Rate Authority No. —.

"In consideration of facts shown, the Southern Pacific Company and the Arizona Eastern Railroad Company are hereby ordered to publish on one day's notice the following rate for the transportation of Campbell's United Shows, consisting of eighteen (18) cars, and to furnish such equipment as may be necessary, within the State of Arizona:

"Tucson, Arizona, to Maricopa, Arizona, $3.00 per mile.
7 "Maricopa, Arizona, to Phoenix Arizona, $3.00 per mile."
"By Order of the Arizona Corporation Commission.
[SEAL.] "FRANK DESOUZA, *Secretary.*"

Dated at Phoenix, Arizona, this 20th day of March, 1914.

Approved:
A. W. COLE,
F. A. JONES,
Commissioners.

EXHIBIT "B."

Before the Arizona Corporation Commission.

Docket No. 165.

In the Matter of Rate to be Charged Campbell's United Shows by Southern Pacific Company and Arizona Eastern Railroad Company for Transportation in Arizona.

Opinion and Order.

F. A. JONES, *Commissioner:*

The Management of Campbell's United Shows complained
8 informally, March 7, 1914, that the Southern Pacific Company and the Arizona Eastern Railroad Company declined to transport the cars, equipment and employees of complainant from Tucson, Arizona, to Phoenix, Arizona, whereupon the Commission, by telegraph, requested the Arizona Eastern Railroad Company to advise upon what authority they declined to enter into a contract with Campbell's United Shows, to which reply was made as follows:

"We have not declined to enter into contract movement Campbell Shows. Traffic Manager, who handles all circus contracts and movements on S. P., was telephoned yesterday for terms and contract to cover movement to Maricopa, and Williams was so advised before he left here. Also say that Arizona Eastern will make contract as soon as arrangements are made for movement to Junction."

General Agent E. L. Williams, of the Campbell Shows, again complained to the Commission on March 18, 1914, that the above named carriers still declined to make a contract or agreement at the usual circus rates, for the transportation of this show from Tucson to Phoenix. The Commission again wired the Arizona Eastern as follows:

"Williams, General Agent Campbell Shows, complains that
9 your company declines to make contract at customary circus movement rates for Campbell Shows, Tucson to Phoenix. Please advise by wire today reasons for discrimination."

To which telegram, General Freight Agent E. W. Clapp, of the Arizona Eastern, replied as follows:

"Tucson, Arizona,

"Mar. 19, 1914.

"Arizona Corporation Commission, Phoenix:

"As private carrier it is not our practice to enter into contract with two circuses moving over line less than thirty days apart except upon mutual understanding between the circuses. Williams is familiar with this practice, and Campbell has heretofore insisted on our following it. The Commission will appreciate reasonableness of this rule when applied to circuses and like organizations."

Under date of March 18, 1914, the Commission was advised by Mr. Clapp as follows:

"Mr. Luce requests that I say Southern Pacific has never held itself out as common carriers of circus or kindred shows, and such movements are subject to special contract executed by South-
10 ern Pacific on its part as private carriers. Our counsel advises that no Federal or State Commissions have been vested with power to regulate movements. Regret that we can not lawfully or consistently depart from our general policy in this instance."

The Commission wired Mr. Clapp, under date of March 19, 1914, as follows:

"Please advise reason for moving Sells Floto under reduced contract rate and demanding full tariff rate for movement Campbell's United Shows by Arizona Eastern and Southern Pacific. See Section 19, Chapter 90, Session Laws, First Legislature, State of Arizona."

The carriers having denied the jurisdiction of the Commission with respect to transportation of certain classes of freight within the State, and having declined to provide rates that, in the opinion of the Commission are just, reasonable and non-discriminatory, an order was issued commanding the Southern Pacific Company and Arizona Eastern Railroad Company to appear before the Commission on March 23, 1914, and show cause why this Commission should not issue a special rate order as follows:

11 "Special Rate Authority No. —.

"In consideration of facts shown, the Southern Pacific Company and the Arizona Eastern Railroad Company are hereby ordered to publish on one day's notice the following rate for the transportation of Campbell's United Shows consisting of eighteen (18) cars, and to furnish such equipment as may be necessary within the State of Arizona:

"Tucson, Arizona, to Maricopa, Arizona, $3.00 per mile.

"Maricopa, Arizona, to Phoenix, Arizona, $3.00 per mile."

The matter came on for hearing at 10 o'clock A. M., Monday, March 23, 1914, in the office of the Commission, at which time and place V. O. Baker, Attorney; E. W. Clapp, General Freight Agent, and A. G. Hallmark, Assistant General Freight Agent, appeared for the respondent carriers, and E. L. Williams, for Campbell's United Shows. General Freight Agent J. G. Stubbs, of the Southern Pacific Company, was present.

E. L. Williams testified on behalf of Campbell's United Shows, to the effect that he had called on Mr. Hallmark several times prior to his making complaint to the Commission; that Mr. Hallmark
12 informed him Sells-Floto had a thirty-day clause over him (meaning Campbell Shows), and that he could not move the Campbell Shows; that there was some agreement between western roads to this effect. Mr. Hallmark informed him that he had been notified not to make any contract as a common carrier. Mr. Williams explained the situation in which this would leave the Campbell Shows, and agreed to go to any point other than Phoenix on the line of his route westward via Phoenix to California. Mr. Hallmark suggested Nogales, which was not acceptable to the show people, being sixty miles south of their direct line. Mr. Williams agreed to go to Ray, a point on the Arizona Eastern, east to Phoenix, which Mr. Hallmark declined to agree to, saying, "No, you will interfere with Sells-Floto excursion rates." The only reasons assigned by the carriers for refusal to transport the Campbell Shows to Phoenix was that such movement would interfere with the Sells-Floto shows at Phoenix, and the reason assigned for refusal to move them to Ray was that it would interfere with the railroad's excursion rates to Phoenix. From testimony, it appears that, after several fruitless efforts to secure a promise of service, the carriers finally agreed that they would move them under what the carriers claim to be their regularly established rates, being Class A, which amounts to approximately $90.00 per car, or $1,400.00 for the movement of eighteen cars, which does not include transportation of some one hundred or one hundred and ten people.

Testimony shows that transportation was furnished by the
13 El Paso & Southwestern railroad into Tucson, for the same shipment, at $3.00 per train mile for the eighteen cars and contents, and the necessary agents and employees, and that the El Paso & Southwestern agreed to move them under special service for $3.50 per mile.

Mr. Williams further testified that the Arizona Eastern and Southern Pacific Company moved the Campbell Shows last year from Tucson to Mesa and from Mesa to Phoenix for $185.00 total charge, and that earlier in the negotiations, between the show people and the respondent carriers, Mr. Hallmark informed Mr. Williams that the charge this year would be about $200.00 for the same movement, as he had one more car. Mr. Williams testified to the effect that he had been promised by the Santa Fe, for movement of his shows, from Phoenix, northward and westward, substantially the same rates as were made by the El Paso & Southwestern railroad for handling into Tucson.

It is of record that the Campbell Shows have made all arrangements for opening in Phoenix, on March 30, 1914, having secured the necessary city license, and that the Campbell people will be in readiness to be moved at any time on March 29, 1914, that may suit the convenience of the carriers.

The railroads offer no testimony in support of their position nor any rebuttal of the testimony given on behalf of the Camp-
14 bell Shows. Counsel for carriers argued that they were not common carriers and held to the opinion that the Commission is without jurisdiction, in support of which they asked permission to file brief, which permission was granted. This brief is now before the Commission, wherein certain cases are cited in support of their contention that the Arizona Corporation Commission has no jurisdiction and is not vested with jurisdiction to prescribe rates for circuses and carnival shows, and that railroads transporting such property are not acting as common carriers when so doing. The Interstate Commerce Commission, in its Administrative Rules, has this to say with respect to the transportation of circus outfits:

"The act to regulate commerce, as amended June 29, 1906, applies to the transportation of circuses and other show outfits, but the Commission recognizes the peculiar nature of this traffic and the difficulty of establishing rates thereon in advance of shippers' request, describing the character and volume of the traffic offered, and has, therefore, entered a general order authorizing carriers to establish rates on circuses and other show outfits by tariff, to become effective one day after filing thereof with the Commission, and relieving them from the duty of posting such tariffs in their stations. Such tariff may consist of a proper title page, reading "as per copy
15 of contract attached," and to it may be attached a copy of the contract under which the circus is moved. As far as practicable, general rules or regulations governing the fixing of such rates should be regularly published and filed."

From this, it appears that the Interstate Commerce Commission views the transportation of circuses as being subject to the Act to Regulate Commerce. We can not see how any other conclusion can be reached, from the reading of the act referred to. The fact that the Commission has authorized carriers to issue rates under less than the statutory notice of thirty days, does not in any particular authorize a departure from the provisions of the Act to Regulate Com-

merce, prescribing just and reasonable rates, and that rates must be equal and fair and not discriminatory or preferential as between shippers. So far as the laws of Arizona are concerned, there are both Constitutional and statutory prohibitions against discrimination. The laws expressly and clearly state that all charges must be just and reasonable. Section 19, Chapter 90, First Session, 1912, declares as follows:

"No public service corporation shall, as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person, or subject any corporation or person to any prejudice or disadvantage. No public
16 service corporation shall establish or maintain any unreasonable difference as to rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service. The Commission shall have the power to determine any question of fact arising under this section."

Chapter 90 defines "Transportation of Property," "Railroad," "Common Carrier" and "Railroad Corporation," and there is nothing therein that could be interpreted or construed as permitting a railroad company, at its option, to declare itself a private carrier of one class of traffic, or that it could, at its own pleasure, be a private carrier of certain property on one day and a common carrier of the same property on another day. It is clearly the duty of a common carrier to transport property when offered and to do so at reasonable and just charges, which shall be open and equal to all shippers. Any assumption to the contrary would at once destroy the laws applicable to transportation services rendered by public service corporations. If carriers could say that they were not common carriers of circus outfits, or analagous shipments, they could, with equal propriety, say that they were not common carriers of any other class of property that they might not be pleased to accept.

It appears from the record in this case that these carriers would have transported this shipment to Nogales under the usual
17 rates and terms accorded such movements; that the refusal to move the shipment to Phœnix was because of a contract entered into by these carriers with another show. The reasons assigned for not moving the Campbell Shows to Ray was because it would interfere with excursion rates to be made on account of the Sells-Floto show at Phœnix. While the record is not clear as to the manner of interference, it can be assumed that a show operating in Ray might result in less people traveling from Ray to Phœnix to attend the Sells-Floto exhibition, which would naturally result in the loss of some passenger revenue to the Arizona Eastern. It seems unnecessary to comment at any length on these two reasons assigned. Neither of them is sound or tenable. If the Southern Pacific Company and the Arizona Eastern Railroad Company have made a contract with the Sells-Floto circus, wherein they have agreed not to transport another circus within thirty days of that period, they have entered into a contract in restraint of trade, and it is not enforceable. The only question in this matter in which the Commission is concerned, is the determination of a reasonable rate.

We hold that it is the duty of these carriers and of all carriers, to transport circuses and other transportable property under reasonable and equal rates.

The Arizona Eastern did not deny that it had offered to transport this circus at approximately $200.00, including the employees and attendants, and providing for the usual transportation of
18 advance agents and bill posters. We have before us the rates named by the El Paso & Southwestern railroad for a movement of this show, from Douglas to Bisbee, and from Bisbee to Tucson a total of 138 miles. This involves a main and branch line haul, and terminal service involved in one stoppage in transit. The haul involved from Tucson to Phoenix is a main line and the branch or local line owned and controlled by the main line, and involves no stoppage in transit. The eighteen carloads were transported from Douglas to Tucson for a total of $400.00, or $2.80 per train mile, which includes general transportation of employees and agents.

On file with the Commission is the contract of the Arizona Eastern Railroad Company for transportation of Sells-Floto Shows Company, from Maricopa to Phoenix, and returning from Phoenix to Maricopa, a total of 70 miles, involving two separate hauls. The charge for this movement is $325.00 for thirty-eight cars, including transportation of general agents and all employees, which is equivalent to 12.22c per car mile, which applied to the eighteen cars of the Campbell Shows, would be equivalent to $2.20 per train mile. The Sells-Floto Show carries a great many animals of considerable value, some of which, in case of loss or damage, the company would be responsible for to the extent of $500.00 each.

It is understood that the Campbell Shows do not carry
19 many animals, and what are carried are of a comparatively low value. We have examined tariffs on file for movement of circuses and carnival outfits in Arizona, and we find among them tariff covering movement of the Campbell Shows on the Santa Fe lines, about one year ago, the movement being from Phoenix to Prescott, Prescott to Clarkdale, Clarkdale to Needles, and Needles to Ludlow, which involves branch and main line hauls and several stops, at the rate of $3.00 per train mile, with the general concession of free transportation of agents and advance people.

Considering all of the facts before us and rates made by other carriers for the Campbell Shows this year, the rates made by these same respondent carriers for other shows, and the rates generally provided for intrastate movements of this kind in the past, we are of the opinion that any rate in excess of $3.00 per mile for the transportation of the Campbell's United Shows, consisting of eighteen cars, employees and attendants, including the transportation of advance agents, to be excessive.

It is therefore ordered That the Southern Pacific Company and Arizona Eastern Railroad Company transport the cars, property, employees and attendants of Campbell's United Shows, from Tucson, Arizona, via Maricopa, to Phoenix, Arizona, and to extend to the said Campbell's United Shows the usual privileges in the movement

of advance agents, for a total amount not to exceed $3.00 per train mile for the entire service.

20 It is understood that the shipment will consist of not to exceed four coaches, four large box cars and ten flat cars, and it is further understood that the Southern Pacific Company and Arizona Eastern Railroad Company may enter into a contract covering this transportation, the terms of which shall not be in substantial variance with the contract now existing between the Arizona Eastern Railroad Company and Sells-Floto Shows Company, with respect to details as to responsibility, service and conditions, copy of said contract being on file with the Commission, and made on March 4, 1914, by and between the Arizona Eastern Railroad Company and Sells-Floto Shows Company.

It is further ordered That, upon submission of evidence that any charge or charges have been exacted by respondent companies for transportation of advance agents or employees, at variance with contract herein referred to, made by respondent, Arizona Eastern Railroad Company with Sells-Floto Shows Company, that the amount or amounts so collected shall be refunded to Campbell's United Shows.

ARIZONA CORPORATION COMMISSION.

[SEAL.] W. P. GEARY, *Chairman;*

F. A. JONES,

Commissioners.

Attest:

FRANK DE SOUZA,

Secretary.

21 Dated at Phoenix, Arizona, this 25th day of March, 1914.

EXHIBIT "C."

Before the Arizona Corporation Commission.

In the matter of rate to be charged Campbell's United Shows, by Southern Pacific Company and Arizona Eastern Railroad Company for transportation in Arizona.

Docket No. 165.

Application of the Southern Pacific Company, by its Attorney, Frank Cox, Esquire, for a rehearing of the above entitled matter, was filed on the evening of March 28, 1914.

The grounds set forth, upon which applicants rely for a rehearing, together with the records before the Commission, having been fully considered, and it appearing to the Commission that its original order in the premises is based upon facts and the law,

It is ordered: That the application of the Southern Pacific Company, one of the respondents herein, moving for a rehearing

22 on the order heretofore made on the 25th day of March, 1914, is hereby denied.

ARIZONA CORPORATION COMMISSION.

[SEAL.] W. P. GEARY, *Chairman;*

F. A. JONES,

Commissioners.

Attest:

FRANK DE SOUZA, *Secretary.*

Dated at Phoenix, Arizona, this 28th day of March, 1914.

EXHIBIT "D."

Before the Arizona Corporation Commission.

STATE OF ARIZONA, at the Relation of G. P. Bullard, Attorney General, Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY and ARIZONA EASTERN RAILROAD COMPANY, Corporations, Defendants.

In Re A. C. C. Docket No. 165, In Contempt.

To the Honorable, the Arizona Corporation Commission:

23 The State of Arizona, at the relation of G. P. Bullard, Attorney General, plaintiff in the above entitled case of action, respectfully shows that heretofore, to-wit: On the 25th day of March, 1914, the Commission, pursuant to law, made and entered into an order which provides, among other things, as follows:

"It is therefore ordered that the Southern Pacific Company and Arizona Eastern Railroad Company transport the cars, property, employees and attendants of Campbell's United Shows, from Tucson, Arizona, via Maricopa, to Phoenix, Arizona, and to extend to the said Campbell's United Shows the usual privileges in the movement of advance agents, for a total amount not to exceed $3.00 per train mile for the entire service.

"It is understood that the shipment will consist of not to exceed four coaches, four large box cars and ten flat cars, and it is further understood that the Southern Pacific Company and Arizona Eastern Railroad Company may enter into a contract covering this transportation, the terms of which shall not be in substantial variance with the contract now existing between the Arizona Eastern Railroad Company and Sells-Floto Shows Company, with respect

24 to details as to responsibility, service and conditions, copy of said contract being on file with the Commission, and made on March 4, 1914, by and between the Arizona Eastern Railroad Company and Sells-Floto Shows Company."

Plaintiff further shows to this Honorable Commission, that, in this respect, said order of said Commission has not been complied with by the defendants, notwithstanding the fact that Campbell's United Shows have made due application to defendants to transport the cars, property, employees and attendants of said Campbell's United Shows from Tucson, Arizona, via Maricopa, to Phoenix, Arizona, and did make demand upon said defendants to extend to the said Campbell's United Shows the usual privileges in the movement of advance agents, for a total amount not to exceed $3.00 per train mile for the entire service, and the said shipment, which was so demanded by Campbell's United Shows over the said defendants did not consist of to exceed four coaches, four large box cars and ten flat cars.

Plaintiff further alleges that, notwithstanding said demand on the part of Campbell's United Shows, these defendants refused to enter into any contract with the said Campbell's United Shows, covering said transportation, of any nature, and they did refuse to transport the cars property, employees and attendants of Campbell's United Shows from Tucson, Arizona, via Maricopa, to
25 Phoenix, Arizona, and that the said defendants did refuse the said Campbell's United Shows the usual privileges in the movement of advance agents, for a total amount not to exceed $3.00 per train mile for the entire service;

And that the said defendants did refuse to make such transportation of Campbell's United Shows, under the order of the Commission hereinbefore set forth.

Wherefore, plaintiff prays that the Commission issue citation to the defendants, Southern Pacific Company and Arizona Eastern Railroad Company, to appear before it at such time as the Commission shall fix, and show cause why it should not punish them for contempt, as by law provided.

G. P. BULLARD,
Attorney General for the State of Arizona.

Dated at Phoenix, Arizona, this 31st day of March, 1914.

EXHIBIT "E."

Before the Arizona Corporation Commission.

In the Matter of Rate to be Charged Campbell's United Shows by Southern Pacific Company and Arizona Eastern Rail-
26 road Company for Transportation in Arizona.

Docket No. 165.

Order to Show Cause.

To Southern Pacific Company and Arizona Eastern Railroad Company and their Officers, Agents, Employees and Attorneys:

Petition having been filed with this Commission, by G. P. Bullard, Attorney General for the State of Arizona, charging defendants,

Southern Pacific Company and Arizona Eastern Railroad Company, with contempt of an order of this Commission, and sufficient cause appearing therefor,

It is ordered: That the said defendants, Southern Pacific Company and Arizona Eastern Railroad Company, be and appear before this Commission, in open session, at the office thereof, on Monday, the 13th day of April, 1914, at 10 o'clock A. M., to show cause why they should not be punished for contempt, as in said petition alleged.

It is further ordered: That a copy of petition heretofore filed, and copy of this order be served upon said defendants at least ten days before the date herein fixed for their appearance before
27 this Commission.

ARIZONA CORPORATION COMMISSION.

[SEAL.] ——— ———, *Chairman;*
A. W. COLES,
F. A. JONES,
Commissioners.

Attest:
FRANK DE SOUZA, *Secretary.*

Dated at Phoenix, Arizona, this 1st day of April, 1914.

EXHIBIT "F."

Before the Arizona Corporation Commission.

STATE OF ARIZONA, at the Relation of G. P. Bullard, Attorney General, Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY and ARIZONA EASTERN RAILROAD COMPANY, Corporations, Defendants.

In Re A. C. C. Docket No. 165, In Contempt.

It appearing that the defendants above named were vio-
28 lating the provisions of Chapter 11, Revised Statutes of Arizona, 1913, with respect to transportation of property of Campbell's United Shows, an order was issued March 20, 1914, directed to Southern Pacific Company and Arizona Eastern Railroad Company, commanding said companies to appear before the Commission, at its office in Phoenix, Arizona, on or before 10 o'clock A. M., March 23, 1914, to show cause why this Commission should not issue an order as follows:

"In consideration of facts shown, the Southern Pacific Company and the Arizona Eastern Railroad Company are hereby ordered to publish, on one day's notice, the following rate for the transportation of Campbell's United Shows, consisting of eighteen (18) cars, and to furnish such equipment as may be necessary, within the State of Arizona:

"Tucson, Arizona, to Maricopa, Arizona, $3.00 per mile.

"Maricopa, Arizona, to Phoenix, Arizona, $3.00 per mile."

Pursuant to said notice, a hearing was had thereon, at which hearing the defendants were represented by counsel and traffic agents, and full opportunity was given those in interest to be heard. A record of the proceedings was made and is contained in the Commission's files. Upon the record, the Commission, on March
29 25, 1914, rendered its opinion and order, Docket No. 165, said opinion and order being duly served upon defendants. The opinion reviewed the testimony and the order based upon same was as follows:

"It is therefore ordered:

"That the Southern Pacific Company and Arizona Eastern Railroad Company transport the cars, property, employees and attendants of Campbell's United Shows from Tucson, Arizona, via. Maricopa, to Phoenix, Arizona, and to extend to the said Campbell's United Shows the usual privileges in the movement of advance agents, for a total amount not to exceed $3.00 per train mile for the entire service.

"It is understood that the shipment will consist of not to exceed four coaches, four large box cars and ten flat cars, and it is further understood that the Southern Pacific Company and Arizona Eastern Railroad Company may enter into a contract covering this transportation, the terms of which shall not be in substantial variance with the contract now existing between the Arizona Eastern Railroad Company and Sells-Floto Shows Company, with respect to details as to responsibility, service and conditions, copy of
30 said contract being on file with the Commission, and made on March 4, 1914, by and between the Arizona Eastern Railroad Company and Sells-Floto Shows Company.

It is further ordered: "That, upon submission of evidence that and charge or charges have been exacted by respondent companies for transportation of advance agents or employees, at variance with contract herein referred to, made by respondent, Arizona Eastern Railroad Company, with Sells-Floto Shows Company, that the amount or amounts so collected shall be refunded to Campbell's United Shows."

It appearing that the defendants herein had wilfully ignored and refused to comply with the terms of the said order, and the Attorney General for the State of Arizona having been advised of the facts, and to take such action as the laws require in such cases, the Attorney General filed on the 31st day of March, 1914, with this Commission a petition praying that the commission issue citation to the defendants, Southern Pacific Company and Arizona Eastern Railroad Company, to appear and show cause why they should not be punished for contempt, as by law provided. An order to show cause was directed to Southern Pacific Com-
31 pany and Arizona Eastern Railroad Company, and their officers, agents, employees and attorneys, on April 1, 1914, reading as follows:

"Petition having been filed with this Commission, by G. P. Bul-

lard Attorney General for the State of Arizona, charging defendants, Southern Pacific Company and Arizona Eastern Railroad Company, with contempt of an order of this Commission, and sufficient cause appearing therefor,

"It is ordered: That the said defendants, Southern Pacific Company and Arizona Eastern Railroad Company, be and appear before this Commission, in open session, at the office thereof, on Monday, the 13th day of April, 1914, at 10 o'clock A. M., to show cause why they should not be punished for contempt, as in said petition alleged.

"It is further ordered: That a copy of petition heretofore filed, and copy of this order be served upon said defendants at least ten days before the date herein fixed for their appearance before this Commission."

32 This order was duly served and on April 13th a hearing was had thereon, the State being represented by its Attorney General, G. P. Bullard, and the defendants by their counsel, C. W. Durbrow, J. C. Forest and V. O. Baker, representing Southern Pacific Company, and Gibson Taylor, representing Arizona Eastern Railroad Company. Campbell's United Shows was represented by Benton Dick, of Tucson. Representatives of Campbell's United Shows and traffic officials of defendants testified.

It was shown that the Campbell's United Shows moved over the lines of the El Paso & Southwestern system, reaching Tucson the latter part of March, 1914, under Intrastate Tariff No. 1458, which said tariff was issued upon this Commission's authority No. 307. The shipment consisted of four coaches, ten flat cars and four large box cars, the number of cars and their contents being the same as was moved from Tucson to Phoenix by defendants. Movement from Douglas to Tucson, with a side branch line haul to Bisbee total distance being 138 miles, total charge $400.00, made the rate per train mile $2.80. From the records of the Commission, it is observed that the El Paso & Southwestern system applied to this Commission for its approval of the rate, which appears to have been voluntarily made and offered to the Campbell's United Shows.

Mr. Campbell testified that, as near as he can remember, de-

33 fendants moved his show property in 1913, from Tucson to Phoenix via Mesa, for about $435.00. This movement involves 135 miles of haul with one more terminal service than was rendered in the movement directly from Tucson to Phoenix. Defendants, in 1913, charged $3.22 per train mile for the transportation of this show including the rendition of the additional terminal service incident to stoppage at Mesa.

In view of the rate made by the El Paso & Southwestern, of $2.80 per train mile, with one stoppage in transit and a side line service, and in view of the rate made by these defendants last year, it can not be said that the rate ordered by the Commission, for the movement this year, of $3.00 per train mile, is not fully compensatory and in all respects a reasonable rate. It appears that notwithstanding the order issued by the Commission, that defendants should render the services required for $3.00 per mile, or a total of $363.00, that defendants demanded and collected from the Campbell's United Shows

the sum of $745.25. It is claimed that this rate is published in passenger tariffs of defendants providing for movement of special baggage cars. Defendants did not furnish baggage cars, nor did they handle the freight cars as a passenger train. Witness Lovejoy, chief clerk of the Superintendent, Southern Pacific Company, stated the train ran as an extra freight; that "any train containing more than four freight cars is put on freight schedule, and is considered an extra freight."

34 For the purposes of this order, it does not seem necessary to further review the facts in the case other than the fact that the Commission finds that defendants, Southern Pacific Company and Arizona Eastern Railroad Company, wilfully and knowingly violated the order of the Commission issued and served, in Docket No. 165.

Upon the facts, fully supported by the records, and in view of the provisions of Paragraph 2357, Chapter 11, Revised Statutes of Arizona, 1913, the Commission has no option but to impose a fine against defendants.

It is therefore ordered: That the Southern Pacific Company be, and it is hereby declared in contempt of this Commission's order, in Docket No. 165, and the said company be, and it is hereby fined the sum of Fifteen Hundred Dollars ($1500.00).

It is further ordered: That Arizona Eastern Railroad Company be, and it is hereby declared in contempt of this Commission's order, in Docket No. 165, and that the said company be, and it is hereby fined the sum of Five Hundred Dollars ($500.00).

It is further ordered: That copies of this order be served upon Southern Pacific Company and Arizona Eastern Railroad Company, and the Attorney General of the State of Arizona, and unless the fines, as herein imposed, be paid and satisfied on or before June 1, 1914, that the Attorney General shall proceed to the collection

35 of same as provided by law.

[SEAL.] ARIZONA CORPORATION COMMISSION,

——— ———, *Chairman;*

A. W. COLE,

F. A. JONES,

Commissioners.

Attest:

FRANK DE SOUZA, *Secretary.*

Dated at Phenix, Arizona, this 16th day of May, 1914.

Filed in Superior Court June 20th, 1914. Wm. E. Thomas, Clerk, by L. P. Hedgpeth, Deputy.

(Title of Court and Cause.)

Answer.

The defendant, Southern Pacific Company, for answer herein:

I.

By way of demurrer to the complaint herein, defendant specifies:
1. That said complaint does not state facts sufficient to constitute a cause of action against defendant.
2. That the Court has no jurisdiction over the defendant.
3. That the Court has no jurisdiction over the subject of
36 the action.
4. That there is a defect of parties defendant.

II.

Referring to Paragraph III of said complaint, defendant denies that it was afforded a full or fair hearing in said proceeding entitled, "In the Matter of Rate to Be Charged Campbell's United Shows by Southern Pacific Company and Arizona Eastern Railroad Company for transportation in Arizona, Docket No. 165," but, on the contrary, defendant avers that the order made and entered in said proceeding was not supported or sustained by any competent evidence, or by any evidence whatsoever, or that any lawful proceeding was held by said Arizona Corporation Commission.

III.

Further answering, defendant avers that the Arizona Corporation Commission had no jurisdiction to make or enter the order requiring defendant to transport the cars and property, employes or attendants of Campbell's United Shows from Tucson, Arizona, to Maricopa, and to extend to said Campbell's United Shows the privilege in the movement of advance agents for a total amount or charge not to exceed $3.00 per train mile for the entire service, for the reason, among others, that the movement of said Campbell's United Shows
37 between said points was interstate in character, the said Campbell's United Shows being engaged in a journey beginning at the City of El Paso, Texas, and extending through the states of New Mexico and Arizona into the State of California, the destination of said Campbell's United Shows having been fixed at the City of San Bernardino in the State of California at the time said Campbell's United Shows began that journey at said City of El Paso, and the said Campbell's United Shows being engaged in a tour through several western states including said States of Arizona, New Mexico and California at the time said Arizona Corporation Commission held said hearing referred to in plaintiff's complaint and made the order pleaded therein; and that said order was made and entered by the

Arizona Corporation Commission directly in contravention of the provisions of Article I, Section 8, of the Constitution of the United States and is therefore beyond the jurisdiction of said Arizona Corporation Commission, and void; and said order of said Arizona Corporation Commission did by its necessary operation compel defendant to reduce its interstate rates and fares applying to the movement of passengers and freight transported by it between points in said State of Arizona while said Campbell's United Shows was engaged in an interstate journey and in transit between the said City of El Paso, Texas, and said City of San Bernardino, California, that said order would directly and by its necessary operation burden and in-
38 terfere with the interstate commerce both passenger and freight of defendant, and would directly and by its necessary operation regulate defendant's interstate freight and passenger rates within said State of Arizona in violation of the exclusive powers granted to Congress by the Constitution of the United States as hereinabove alleged.

IV.

That said Arizona Corporation Commission had no jurisdiction to make or enter said order for the further reason that there were no intrastate tariffs then on file with said Arizona Corporation Commission showing the rate for the movement of privately owned equipment in circus trains or otherwise, or obligating defendant to transport privately owned equipment in circus trains.

V.

That said order of the Arizona Corporation Commission was and is beyond the jurisdiction of said Commission for the further reason that upon the hearing before said Commission in said proceeding, there was no evidence introduced which was competent or could be considered by said Commission showing, or in any way tending to show, that the rates in effect on defendant's line between Tucson and Maricopa for the transportation of the property, equipment, attendants and employes of said Campbell's United Shows were excessive, unjust, unreasonable or discriminatory, nor was there any
39 competent evidence introduced at said hearing which would support or sustain the findings of said Commission, or which would support or sustain the order of the Commission requiring defendant to transport said Campbell's United Shows from Tucson to Maricopa, and that for the reasons herein mentioned said order was and is void and of no effect.

Wherefore, Defendant prays that plaintiff take nothing by its said action, and that defendant be hence dismissed with its costs.

C. W. DURBROW,
J. C. FOREST,
Attorneys for Defendant.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

S. N. Bostwick being duly sworn, deposes and says: That he is an officer, to-wit: Assistant General Freight Agent, of Southern Pacific Company, defendant in the above entitled action, and that as such officer he is qualified to make this affidavit for and on behalf of said corporation; that he has read the foregoing answer and knows the contents thereof and that the same is true of his own knowledge, except as to those matters which are therein stated on information or belief, and as to those matters he believes it to be true.

S. N. BOSTWICK.

40 Subscribed and sworn to before me this 8th day of July, 1914.

[SEAL.] HUGH T. SIME.
Notary Public in and for the City and County of San Francisco, State of California.

Service admitted this 10 day of July, 1914.

G. P. BULLARD
(RAYBURN),
Attorney for Plaintiff.

Filed: July 10, 1914. Wm. E. Thomas, Clerk, by L. P. Hedgpeth, Deputy.

(Title of Court and Cause.)

Special Findings of Fact and Conclusions of Law.

This cause came on to be heard on the 9th day of December, 1915, the same being one of the judicial days of the above entitled Court, upon the complaint of plaintiff and the answer of defendant, Wiley E. Jones, Attorney General and Leslie C. Hardy, Assistant Attorney General, appearing for the plaintiff, and W. C. Durbrow and J. C. Forest, Esquires, appearing for the defendant, the demurrer of defendant having been urged but overruled. The cause was tried to the Court sitting without a jury, a jury having been waived by the respective parties, and thereupon, to-wit: Upon the 9th day of December, A. D. 1915, witnesses were sworn and examined, and documentary evidence introduced to support the contentions of both plaintiff and defendant, and the cause being closed, after full argument by counsel for both parties, was submitted to the Court for consideration and decision, and the Court being fully advised in the premises, makes the following:

41 *Special Findings of Fact.*

I.

That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of Kentucky, and is duly authorized to transact business within the State of Arizona.

II.

That on the 20th day of March, 1914, there was promulgated under the authority and seal of the Arizona Corporation Commission in Docket No. 165 of that Commission, an order to show cause, on or before the 23rd day of March, 1914, why the Arizona Corporation Commission should not issue a special rate authority compelling the defendant to publish on one day's notice, a rate for the transportation of Campbell's United Shows, consisting of eighteen (18) cars, from Tucson, Arizona, to Maricopa, Arizona, at the rate of Three Dollars ($3.00) per mile, and further requiring the defendant to furnish such equipment as was necessary to move Campbell's United Shows within the State of Arizona.

III.

That pursuant to said order to show cause, the defendant appeared before the Arizona Corporation Commission on the 25th day of March, 1914, and after a full and fair hearing, the Arizona Corporation Commission entered the following order:

42 "That the Southern Pacific Company and Arizona Eastern Railroad Company transport the cars, property, employees and attendants of Campbell's United Shows from Tucson, Arizona, via Maricopa, to Phoenix, Arizona, and to extend to the said Campbell's United Shows the usual privileges in the movement of advance agents, for a total amount not to exceed $3.00 per train mile for the entire service.

"It is understood that the shipment will consist of not to exceed four coaches, four large box cars and ten flat cars, and it is further understood that the Southern Pacific Company and Arizona Eastern Railroad Company may enter into a contract covering this transportation, the terms of which shall not be in substantial variance with the contract now existing between the Arizona Eastern Railroad Company and Sells-Floto Shows Company, with respect to details as to responsibility, service and conditions, copy of said contract being on file with the Commission, and made on March 4, 1914, by and between the Arizona Eastern Railroad Company and Sells-Floto Shows Company.

"It is further ordered That, upon submission of evidence
43 that any charge or charges have been exacted by respondent companies for transportation of advance agents or employees, at variance with contract herein referred to, made by respondent,

Arizona Eastern Railroad Company with Sells-Floto Shows Company, that the amount or amounts so collected shall be refunded to Campbell's United Shows."

IV.

That on the 28th day of March, 1914, the Arizona Corporation Commission denied the defendant's application for a re-hearing of said order recited in Paragraph III. hereof.

V.

That said order entered by the Arizona Corporation Commission on the 25th day of March, 1914, as recited in Paragraph III. hereof, was not complied with by defendant, but wholly ignored.

VI.

That on the 31st day of March, 1914, the State of Arizona, at the relation of George P. Bullard, Attorney General, filed a petition addressed to the Arizona Corporation Commission, praying that an order be entered, directed to the defendant, requiring it to show
44 cause why it should not be punished for contempt of the order of the Arizona Corporation Commission, as recited in Paragraph III. hereof, and that pursuant to the said petition, the Arizona Corporation Commission, on the 1st day of April, 1914, entered an order, directed to the defendant, requiring it to show cause on the 13th day of April, 1914, at 10 o'clock A. M., why it should not be punished for contempt, as alleged in the said petition of the State of Arizona, at the relation of George P. Bullard, its Attorney General, as aforesaid.

VII.

That pursuant to said petition of the State of Arizona, at the relation of George P. Bullard, Attorney General, a hearing was had, and the defendant was adjudged guilty of a contempt of the order of the Arizona Corporation Commission, recited in Paragraph III. hereof, whereupon the Arizona Corporation Commission, upon the 16th day of May, 1914, entered the following order:

"It is therefore ordered: That the Southern Pacific Company be, and it is hereby declared in contempt of this Commission's order, in Docket No. 165, and the said company be, and it is hereby fined the sum of Fifteen Hundred Dollars ($1,500.00).

45 "It is further ordered: That Arizona Eastern Railroad Company be, and it is hereby declared in contempt of this Commission's order, in Docket No. 165, and that the said company be, and it is hereby fined the sum of Five Hundred Dollars ($500.00).

"It is further ordered: That copies of this order be served upon Southern Pacific Company and Arizona Eastern Railroad Company, and the Attorney General of the State of Arizona, and unless the fines, as herein imposed, be paid and satisfied on or before June 1,

1914, that the Attorney General shall proceed to the collection of same as provided by law."

VIII.

That the defendant refused to pay and satisfy the fine imposed by said order of the Commission, as recited in Paragraph VII, herein, on or before June 1, 1915, and thereupon, to-wit: Upon the 29th day of June, 1914, the State of Arizona filed with the above entitled Court its complaint against the defendant, which prayed for the recovery of the sum of Fifteen Hundred ($1,500.00) Dollars, the fine assessed against the defendant by the Arizona Corporation
16 Commission for a contempt of the order of said Arizona Corporation Commission, as recited in Paragraph III hereof.

IX.

That the defendant engaged itself to transport for hire circuses and other institutions similar to that conducted by Campbell's United Shows, which the defendant was required to transport, as provided by the order recited in Paragraph III hereof.

Conclusions of Law.

The Court from the above Special Findings of Fact, concludes as a matter of law therefrom, as follows:

I.

That the Arizona Corporation Commission had jurisdiction of the person of the defendant and the subject matter of the action, and was authorized and empowered by the Constitution and laws of the State of Arizona to enter the order as recited in Paragraph III of the Special Findings of Fact, and to adjudge the defendant in contempt for a refusal to obey said order.

II.

That the above entitled Court has jurisdiction of the person of the defendant, and the subject matter of the above entitled
17 cause of action, and is empowered by the Constitution and laws of the State of Arizona to enforce and collect the fine imposed upon the defendant by the Arizona Corporation Commission for a violation of the order of that Commission, as recited in Paragraph III of the Special Findings of Fact herein.

III.

That the order of said Arizona Corporation Commission, as recited in Paragraph III of the Special Findings of Fact, in no way imposed a burden upon interstate commerce, in contravention of Section 8 of Article I of the Constitution of the United States.

IV.

That it was the duty of the defendant, under the Constitution and laws of the State of Arizona, to transport Campbell's United Shows, as provided by the order of the Arizona Corporation Commission, as recited in Paragraph III of the Special Findings of Fact, even though it acted in such capacity as a private carrier, for the reason that it had held itself out and engaged to transport circuses and other institutions similar to Campbell's United Shows.

V.

That even though the defendant, in the transportation of Campbell's United Shows, engaged itself as a private carrier, it so
48 engaged itself as a carrier for hire, and was, under the Constitution and laws of the State of Arizona, subject to regulation by the Arizona Corporation Commission.

VI.

That the order of the Arizona Corporation Commission as recited in Paragraph III of the Special Findings of Fact did not impair the liability of the defendant as a private carrier.

VII.

That the plaintiff is entitled to judgment against the defendant for the sum of Fifteen Hundred Dollars ($1500.00).

Done in open Court this 5th day of January, A. D. 1916.
R. C. STANFORD, *Judge*.

Filed at 10:15 A. M. Jan. 6, '16. James Miller, Jr., Clerk, by G. P. Macdonald, Deputy.

(Title of Court and Cause.)

Judgment.

This cause coming on to be heard on the 9th day of December A. D. 1915, upon the complaint of plaintiff and the answer of defendant, Wiley E. Jones, Attorney General, and Leslie C. Hardy, Assistant Attorney General, appearing for the plaintiff, and W. C.
Durbrow and J. C. Forest, Esquires, appearing for the de-
49 fendant, the demurrer of defendant having been urged but overruled, was tried by the court sitting without a jury, a jury having been waived by the respective parties. Witnesses were sworn and examined, and documentary evidence introduced to support the contentions of both plaintiff and defendant, and the evidence being closed, the court took the cause under advisement,

Thereupon, to-wit: on the 29th day of December, A. D. 1915, the court, being fully advised in the premises, ordered that plaintiff have judgment against the defendant, as prayed for in the complaint.

Now, therefore, it is ordered, adjudged and decreed, by the court that plaintiff, State of Arizona, do have and recover of and from the Southern Pacific Company, a corporation, defendant, the sum of Fifteen Hundred Dollars ($1,500.00).

Done in open Court this 9th day of Dec., A. D. 1915.

R. C. STANFORD, *Judge.*

Endorsements.

Title of Court and Cause—No. 7863.
Docketed—O. K. J.
Judgment.
Copy received this 30th day of December, 1915. J. C. Forst, Attorney for Defendant.

50 Filed at 9:50 A. M. Jan. 6, 1916. James Miller, Jr., Clerk, By G. P. Macdonald, Deputy.

Ent. J. B. "K" page 294-5.

(Title of Court and Cause.)

Motion for New Trial.

Comes now the defendant, Southern Pacific Company, and moves the court to set aside the judgment entered herein on the 29th day of December, 1915, and grant to this defendant a new trial of said cause.

Said motion is based upon the following grounds:

I.

The court erred in admitting evidence for the plaintiff over the objection of this defendant.

II.

The court erred in rejecting evidence offered on behalf of the defendant.

III.

That the evidence in the cause does not sustain the judgment.

IV.

That the judgment is contrary to law.

51 V.

That the judgment is contrary to the evidence.

VI.

That the judgment is contrary to the law and the evidence.

C. W. BURBROW,
J. C. FOREST,
F. B. AUSTIN,
Attorneys for Defendant.

Endorsements.

Title of Court and Cause—No. 7863.
Received copy of within Motion for New Trial this 7th day of January, 1916. Leslie C. Hardy, Attorney for Plaintiff.
Filed Jan. 7, 1916. James Miller, Jr., Clerk, by G. P. Macdonald, Deputy.

52 (Title of Court and Cause.)

Minute Entries.

The following is a correct abstract of all the minutes affecting the record in this case:

July 11, 1914.

At this day, this matter coming on to be heard upon the Demurrer of the Defendant to the complaint herein, it is ordered by the Court that the same be dropped from the Motion Docket.

(Title of Court and Cause.)

January 25, 1915.

At this day on call of the calendar, it is ordered by the Court that Wiley E. Jones be substituted as Attorney for Plaintiff in this case.

(Title of Court and Cause.)

April 3, 1915.

By order of the Court, the Demurrer of Defendant is continued for one week.

53 (Title of Court and Cause.)

April 10, 1915.

Comes now, Wiley E. Jones, Counsel for Plaintiff, the Defendant appearing by J. C. Forest, C. W. Durbrow and Gerald Jones. And

thereupon, the demurrer of Defendant to Plaintiff's complaint is argued by Counsel respectively and submitted, and the Court not being sufficiently advised in the premises, takes the same under advisement.

(Title of Court and Cause.)

May 8, 1915.

The demurrer of Defendant to Plaintiff's complaint having been heretofore submitted to the Court for its consideration and decision, and having considered the same, and being now fully advised in the premises, the Court overrules the said demurrer. And thereupon, the Defendant excepts to the order of the Court overruling the said demurrer.

(Title of Court and Cause.)

September 13, 1915.

By order of the Court, this cause is set down for trial for October 29, 1915.

54 (Title of Court and Cause.)

December 7, 1915.

Comes now J. C. Forest, Counsel for the Defendant. And thereupon, on motion of the Defendant, it is ordered by the Court that this cause be set down for trial for December 9, 1915.

(Title of Court and Cause.)

December 9, 1915.

Comes now L. C. Hardy, Assistant Attorney General, present on the part of the State; J. C. Forrest appearing as counsel for the Defendant.

Now, on motion of the Defendant, it is ordered by the Court that F. B. Austin be added as the Associate Counsel for the Defendant in this case.

It is further ordered by the Court that A. W. Durbrow be added as Associate Counsel for the Defendant. And thereupon this cause comes on regularly for trial upon the issues joined, before the Court without a Jury.

Now, it is ordered by the Court that this cause be consolidated with causes numbered 7864 and 7863.

55 Now, Plaintiff's Exhibits "A" and "B" are introduced in evidence and filed by the Clerk. Plaintiff rests.

Now, Defendant's Exhibit "1" is introduced in evidence and filed by the Clerk, and W. S. Goldsworthy, Charles K. Adams and H. C. Hallmark are sworn and testified on the part of the Defendant, and Defendant's Exhibits "2" and "3" are introduced in evidence and filed by the Clerk.

Now, the cause is argued to the Court by Counsel respectively and submitted, and the Court, not being sufficiently advised in the premises, takes the said matter under advisement.

(Title of Court and Cause.)

December 29, 1915.

This cause, having been heretofore tried, argued and submitted to the Court for its consideration and decision, and having considered the same, and being now fully advised in the premises, the Court finds that the Plaintiff is entitled to judgment in accordance with the prayer of the complaint.

And it is ordered by the Court that judgment be entered herein in accordance with such findings, which when signed by the Court shall be entered in the Judgment Book.

56 (Title of Court and Cause.)

December 30, 1915.

Comes now, J. C. Forest, one of the Attorneys for the Defendant, in open Court, and excepts to the order of the Court heretofore entered in this cause rendering judgment for the plaintiff herein.

(Title of Court and Cause.)

January 8, 1916.

By order of the Court, the Defendant's objection to form of judgment is passed.

(Title of Court and Cause.)

January 15, 1916.

Comes now, J. C. Forest, Counsel for the Defendant; the Plaintiff making no appearance. And thereupon, it is ordered by the Court that the objections of the Defendant to the form of judgment entered in this cause, be dropped from the Motion Docket.

Now, the motion of the Defendant to set aside the judgment entered herein, and to grant this Defendant a new trial, is submitted to the Court without argument, and the Court being
57 fully advised in the premises, it is ordered that the said motion be and the same is hereby denied. And thereupon, the Defendant in open Court excepts to the order of the Court overruling the Defendant's motion to set aside the judgment, and for a new trial.

Now, on motion of the Defendant, it is ordered by the Court that execution herein be and the same is hereby stayed for a period of sixty days from this date.

(Title of Court and Cause.)

March 13, 1916.

Comes now, J. C. Forest, Counsel for the Defendant. And thereupon, on motion of the Defendant, it is ordered by the Court that the Defendant may withdraw from the files Defendant's Exhibit 2 and 3, and may file copies in the place of said Exhibits; the word "copy" to be noted on the bottom of such copies.

(Title of Court and Cause.)

Notice of Appeal.

To the State of Arizona, Plaintiff, and Wiley E. Jones, Attorney General of the State of Arizona, and L. C. Hardy, Assistant Attorney General, its Attorneys:

58 You will please take notice that the above named defendant Southern Pacific Company, a corporation, appeals to the Supreme Court of the State of Arizona, from the judgment rendered in the said Superior Court of Maricopa County, in the above entitled cause, on the 29th day of December, 1915, in favor of the above named plaintiff, State of Arizona, and against the said defendant, Southern Pacific Company, a corporation, and from the whole thereof, and also from the order denying the said defendant's motion for a new trial.

C. W. DURBROW,
F. B. AUSTIN,
J. C. FOREST,
Attorneys for the Defendant.

Filed March 14, 1916.

Copy received this 14th day of March, 1916.

WILEY E. JONES AND
LESLIE C. HARDY
Attorneys for Plaintiff.

(Title of Court and Cause.)

Bond on Appeal.

Know all men by these presents:

That we, Southern Pacific Company, a corporation, as principal, and Clinton Campbell and Edward Eisele, as sureties, are held and firmly bound unto the State of Arizona in the penal sum of Three Thousand One Hundred ($3,100.00) Dollars, for the payment of which sum well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly, severally firmly by these presents.

59 Sealed with our seals and dated this 8th day of March, A. D. 1916.

The condition of the above obligation is such that,

Whereas, the said State of Arizona did, on the 29th day of December, 1915, in the Superior Court of Maricopa County, State of Arizona, recover a judgment against the said Southern Pacific Company, a corporation, for the sum of One Thousand Five Hundred ($1,500.00) Dollars, without costs, from which judgment and the whole thereof the said Southern Pacific Company, a corporation, has taken an appeal to the Supreme Court of the State of Arizona;

Now, therefore, if the said Southern Pacific Company, a corporation, shall prosecute its said appeal with effect; and, in case the judgment of the Supreme Court shall be against it, will perform such judgment, sentence or decree and pay all such damages and costs as may be awarded against it on such appeal, then this obligation to be void; otherwise, to remain in full force and effect.

SOUTHERN PACIFIC COMPANY,
By J. C. FOREST,
Its Attorney, Principal.
CLINTON CAMPBELL,
EDWARD EISELE,
Sureties.

60 STATE OF CALIFORNIA,
County of Maricopa, ss:

Clinton Campbell and Edward Eisele being first duly sworn, each for himself and not one for the other, says:

That he is a resident and freeholder within the County of Maricopa and State of Arizona; that he is worth the sum of Three Thousand One Hundred ($3,100.00) Dollars, the penalty in the within bond, over and above his just debts and liabilities and exclusive of property exempt from execution.

CLINTON CAMPBELL.
EDWARD EISELE.

Subscribed and sworn to before me this 8th day of March, A. D. 1916.

My commission expires January 17th, 1920.

[SEAL.] VERNON L. CLARK,
Notary Public.

The clerk of said Superior Court has estimated the costs on appeal to the Supreme Court at Fifty ($50.00) Dollars.

JAMES MILLER, JR., *Clerk.*

Approved March 14, 1916.

R. C. STANFORD, *Judge.*

Title of Court and Cause. (Bond on Appeal.)

Copy received this 14th day of March, 1916.

WILEY E. JONES &
LESLIE C. HARDY,
Attorneys for Plaintiff

Filed Mar. 14, 1916. James Miller, Jr., Clerk, by G. F. Macdonald, Deputy.

61 (Title of Court and Cause.)

Stipulation.

It is hereby stipulated by and between the plaintiff and defendant herein that the defendant may have until March 20th, 1916, to file the transcript of the Court Reporter's notes as and for his Bill of Exceptions.

Dated Phoenix, Arizona, this 14th day of March, 1916.

LESLIE C. HARDY,
Attorney for Plaintiff.
J. C. FOREST,
Attorney for Defendant.

Filed Apr. 3, 1916. James Miller, Jr., Clerk, by G. F. Macdonald, Deputy.

(Title of Court and Cause.)

Notice of Filing Transcript of Reporter's Notes.

To the State of Arizona, the Above Named Plaintiff, and Wiley E. Jones, Attorney General of the State of Arizona, and L. C. Hardy, Assistant Attorney General, its Attorneys:

You, and each of you will please take notice that the above named defendant, Southern Pacific Company, has, on the 20th day of March, 1916, filed in the office of the Clerk of the Su-
62 perior Court of the State of Arizona in and for the County of Maricopa, in the above entitled action, transcript of the reporter's notes of the testimony and evidence adduced on the trial of the above entitled action as a bill of exceptions and statement of facts herein

Dated this 20th day of March, A. D. 1916.

C. W. DURBROW,
F. B. AUSTIN,
J. C. FOREST,
Attorneys for the Defendant.

Copy received this 20th day of March, 1916.

LESLIE C. HARDY,
Attorney for Plaintiff.

Filed Mar. 20, 1916. James Miller, Jr., Clerk; by Macdonald, G. F., Deputy.

(Title of Court and Cause.)

Reporter's Transcript.

The above entitled cause came on regularly for hearing the 9th day of December, A. D. 1915, before the Honorable R. C. Stanford, Judge of the Superior Court of Maricopa County, State of Arizona, sitting without a jury.

The plaintiff was represented by Leslie Hardy, Esq., Assistant to the Attorney General for the State of Arizona; and the defendants were represented by C. W. Durbrow, Esq.

Thereupon the following procedures were had:

By Mr. Hardy: I think it would be well to have an order
63 made joining the trial of these two causes.

By the Court: Very well, then, we will make that order.

By Mr. Hardy: Now, if the Court please, without objecting, and I appreciate there will be no objection made by counsel for defendants, I desire to introduce into the records Docket Number 165 of the Arizona Corporation Commission. This docket, if your Honor please, among other things includes an order of March 20th, 1914, which is Special Rate Authority, the rate of these companies, a portion of which I have just read, together with a brief of Mr. Frank Cox, Attorney of the Southern Pacific Company, which is directed to the Commission, and together with the opinion and order of the Arizona Corporation Commission charging the defendants guilty of contempt, dated March 25th, 1914, together with Motion for a New Hearing by the Southern Pacific Company and the Arizona Eastern Railroad Company, dated March 28th, 1914, together with a certificate of the Secretary of the Arizona Corporation Commission dated the 28th day of March, 1914, certifying that the order therein referred to was delivered to the Southern Pacific Company and the Arizona Eastern Railroad Company on the 26th day of March, 1914, together with the order of
the Arizona Corporation Commission of March 28th, 1914,
64 denying the motion for a rehearing of the Southern Pacific Company and the Arizona Eastern Railroad Company, which was filed on even date therewith together with an opinion signed by G. P. Bullard, Attorney General for the State of Arizona, on the 31st day of March, 1914, asking for a citation and an order to show cause directed to the Southern Pacific Company and the Arizona Eastern Railroad Company, why they should not be punished for contempt of the order of the Arizona Corporation Commission of March 20th, 1914, together with an order to show cause directed to the Southern Pacific Company and the Arizona Eastern Railroad Company, directing them to show cause on the 13th day of April, 1914, why they should not be punished for contempt of that motion, together with an opinion and order of the Arizona Corporation Commission dated May 16th, 1914, charging the Southern Pacific Company and the Arizona Eastern Railroad

Company with contempt of the order of the Arizona Corporation Commission of March 20th, 1914, and charging that the Southern Pacific Company pay a fine of Fifteen Hundred ($1500) Dollars, and the Arizona Eastern Railroad Company pay a fine of Five Hundred ($500) Dollars in satisfaction of such contempt. Attached to this docket, if the Court please, is a copy of complaint against each of these railroad companies which I do not care to introduce into the records because the originals of these complaints are filed in this case and will appear in the files of the Corporation Commission. I ask at the time this docket is introduced, that I may have the privilege at a subsequent date to substitute certified copies therefor.

By Mr. Durbrow: Certainly. It will not be necessary to have them certified so long as they are true copies.

By the Court: Do you want to have them introduced as one exhibit?

By Mr. Hardy: I think it will be less cumbersome if I do.

Docket Number 165 of the Arizona Corporation Commission was thereupon introduced in evidence and marked plaintiff's exhibit A.

By Mr. Hardy: If the Court please, I ask to introduce Reporter's Transcript Reporter's Minutes of the hearing of March 23rd, 1914, in the matter of the rate to be charged Campbell's United Shows by the Southern Pacific Company and Arizona Eastern Railroad Company for transportation in Arizona, which is herein entitled Docket Number 165.

By Mr. Durbrow: No objections.

By the Court: It will be received and marked plaintiff's exhibit B.

By Mr. Hardy: If the Court please, I desire to introduce the Reporter's Minutes in the contempt proceedings in Docket Number 165, which is a proceeding in the matter of rate to be charged Campbell's United Shows by Southern Pacific Company and Arizona Eastern Railroad Company for transportation in Arizona. That is a contempt proceeding.

By Mr. Durbrow: For what purpose is this introduced, this second transcript?

By Mr. Hardy: Well, it was upon this hearing that the fine was made of Fifteen Hundred (1500) and Five Hundred (500) Dollars respectively.

By Mr. Durbrow: I don't believe that is properly admissable under the proceedings. We are called here at this time to determine the question of whether the Commission has entered a valid order and has adjudged the companies in contempt. I am willing to stipulate that a proceeding was had before the Commission which resulted in the order adjudging these defendants in contempt of court, in contempt of the Commission, and I do not see how the transcript can serve any purpose for the reason that if I enter into that stipulation, it must be assumed that the question went through the Commission prescribed by statutes and assessed these

fines. I have no objection to anything in that regard. My only purpose is in the event appeal is taken in this case, it would only serve to increase the cost we have in the printing of the transcript.

By the Court: I think the stipulation will serve the purpose.

67 By Mr. Hardy: If the Court please, of course the function of this Court at the present time is to determine the jurisdiction and power of the Arizona Corporation Commission to assess this fine for contempt. According to Mr. Durbrow's argument you can not do so unless it has before it a transcript of the evidence at the trial. This transcript which I am attempting to introduce now shows the testimony of the witnesses upon which was formulated the decree assessing the penalty. I think it is essential that this Court has before it a full and complete transcript of the proceedings before the Arizona Corporation Commission in view of the fact that this Court must assess and collect the penalty.

By Mr. Durbrow: If the Court please, there is no issue raised here as to the priority of the Commission in proceeding to adjudge us in contempt. The complaint filed here is charging us with violating an order of the Commission and that order was one which required us to apply a certain rate for the moving of a circus. Now this complaint on page 3, goes on to recite that as a result of the hearing conducted on the 25th day of April, 1911, the defendant was declared in contempt. That is not denied and we have not raised any question here as to the insufficiency of the proceedings before the Commission in the contempt matter, but we have answered merely in denying that the Commission was ever vested with any authority to enter the order, which was the first order compelling us to apply this particular rate. Now

68 under the issues that are framed by the pleadings, it is my contention that this transcript is wholly irrelevant and incompetent.

By Mr. Hardy: Of course, if it is irrelevant and incompetent at this time, it merely forces me to the extra inconvenience with Mr. Durbrow to secure witnesses, to again put in testimony of what we already have here and upon which the Corporation Commission formulated its order.

By Mr. Durbrow: We are not trying the contempt order.

By Mr. Hardy: Under my theory of this case, it is only the duty of this Court, the statutory duty, to collect that fine if it was the action of a tribunal resulting from an authority, a lawful authority, which was vested in that tribunal. Now, I say this Court can only go back to the transcript of the proceedings before that tribunal to determine whether or not it had that authority to assess that fine. This Court must only look into the transcript of the proceedings before that Commission to determine whether or not it had authority. Is it fair to that Commission if they now bring into this Court and introduce evidence which that Court did not have the opportunity to inquire into? I say the only duty of this Court is to assess this punishment and collect it if that tribunal acted within its authority.

Now, how can it be determined unless we introduce into this
69 record for the Court to determine, the transcript of the proceedings had before that Commission?

By the Court: The decree of that tribunal will be in evidence, is in evidence here by your documentary evidence heretofore introduced, and the thing you are now introducing is the evidence of witnesses?

By Mr. Hardy: Yes.

By the Court: I cannot see yet that you are needing it, Mr. Hardy.

By Mr. Durbrow: If I had raised, in my answer, the issue that the proceedings before the Corporation Commission in the contempt matter were insufficient, then, of course it would be a material issue for this Court to consider and determine, but this is the situation, if your Honor please: We were hailed before the Commission in an informal manner, as we will show by the evidence already introduced by counsel, and an order was entered by the Commission which we plead in our answer was a void order and beyond the power of the Commission, in violation of the Constitution of the United States, but we have not said one word that when this Commission, in the exercise of the powers that are accorded to it by the statutes of the State, proceeded to adjudge us in contempt, that they proceeded erroneously or that they did not have sufficient evidence, full and complete for adjudging us in contempt. The issue raised here is as to the
70 lawfulness of the original order of the Commission adjudging us in contempt. Now, counsel fails to distinguish between a proceeding before a legislative or quasi judicial body such as this Commission, and a proceeding before a purely judicial tribunal such as this Court. We are entitled, of course, as the Supreme Court of the United States has held, to get it in Court and to have these questions judicially determined, and as I say, if I had raised a question as to the sufficiency of the proceedings before the Commission in the contempt matter, I would be estopped from now objecting to the admissibility of that evidence, but I concede now by the stipulation which I have offered that the proceedings before the Arizona Corporation Commission on contempt are full, sufficient, and complete, provided, of course, they had the power and authority to enter the original order compelling us to publish this special rate. I can not see what purpose that evidence will serve.

By the Court: Will not that stipulation in the records do away with the introducing of this transcript? It looks like it will.

By Mr. Hardy: All I want to do is to preserve this record. I know, regardless of the judgment of your Honor, this case will be appealed, and I want it appealed upon a full and complete transcript.

By the Court: You have this in the records now, that this evidence is not questioned in any way. It is objected to that it does
71 make a cumbersome record in repeating; that is the objection. He is conceding the evidence was offered and there is no objection to it if they had the right to make the decree.

By Mr. Hardy: All the facts were determined by the demurrer any your Honor determined they did have the power.

By the Court: Have you much more to introduce in the way of evidence?

By Mr. Hardy: No, that was my last offer. I think, though, that perhaps Mr. Durbrow wanted me to introduce some tariffs which are a part of this file.

By the Court: I do not agree with you that that is necessary under the stipulation that has been put into the records by the defendants.

By Mr. Durbrow: I am going further, if your Honor please, and stipulate that if the Arizona Corporation Commission had power and authority and proceeded regularly as required by the statutes of the State of Arizona to enter the original order compelling us to promulgate and apply this original rate that they ordered, that then they have taken sufficient proceedings to adjudge us in contempt. That narrows the issues to determine whether or not the Commission in the first instant entered a valid order, their original order; and I am conceding that the following proceedings have been regular,
72 and merely reserve the right to raise the questions which are framed by the issues here in these pleadings, that the original order of the Arizona Corporation Commission is a void order, and therefore the order in contempt must fall.

By the Court: Have you any reply to that, Mr. Hardy?

By Mr. Hardy: No, not with that statement of Mr. Durbrow's in the record, I won't urge the introduction of this transcript.

By the Court: Very well.

By Mr. Hardy: If the Court please, that is all I desire to offer and I close with the offer made.

By Mr. Durbrow: Before I introduce evidence may we stipulate that these tariffs may be submitted in evidence?

By Mr. Hardy: Yes.

By Mr. Durbrow: That is, the tariffs under which this outfit finally moved.

By Mr. Hardy: Yes.

By Mr. Durbrow: May it please your Honor, by stipulation, I will introduce in evidence the tariffs of the Arizona Eastern Railroad Company, local and joint passenger tariffs Nos. I. C. C. 132 and A. C. C. 19, effective August 30th, 1912, and issued July 24th,
73 1912, and the tariff of the Southern Pacific Company, Circular No. 2191, I. C. C. No. 2062, and A. R. C. No. 131, and as the evidence showed before the Arizona Corporation Commission, the circus or the carnival, whatever it may be termed, moved and was transported by these defendants under these tariffs. That is the fact, is it not?

By Mr. Hardy: Yes.

By the Court: Admit the two, Arizona Eastern and Southern Pacific as one exhibit, Number 1 for the defendants.

W. S. Goldsworthy was called as a witness on behalf of the defendants and, having been first duly sworn testified as follows:

Direct examination.

By Mr. Durbrow:

Q. What is your full name, please?

A. W. S. Goldsworthy.

Q. And what is your business, please Mr. Goldsworthy?
A. General agent, Santa Fe Railway.
Q. How long have you occupied that position?
A. Ten years.
74 Q. And how long have you been stationed in the City of Phoenix?
A. Ten years.
Q. And were you then, the general agent of the Santa Fe in Phoenix in March, 1914?
A. I was, sir.
Q. Did the Santa Fe Railroad Company transport Campbell's United Shows over their railroad in March, 1914?
A. They did, sir.
Q. How were they transported, please?
A. By special train.
Q. And between what points?
A. The contract, I believe was for moving to Prescott, possibly to Clarksdale and Needles, California.
Q. And to Needles, California?
A. Yes, sir.
Q. When did they apply to you for a rate to move that show?
A. On about March 20th, 1914.
Q. And did they, at that time, or any representative of the
75 Campbell's United Shows advise you as to the points between which they wished to be transported?
A. They did, sir.
Q. What points did they name?
A. Prescott, Clarkdale, Kingman and Needles.
Q. And did you quote a rate for movement between those points?
A. I asked our General Freight Office for a rate at that time.

By Mr. Durbrow: That is all, thank you.

Cross-examination.

By Mr. Hardy:

Q. That movement what did you charge them per train mile?

By Mr. Durbrow: I will introduce the contract and that will show you.

A. They were handled under special contract: I have not the rate in mind.

By Mr. Hardy: You will introduce the contract?
By Mr. Durbrow: Yes, I will introduce it.
Thereupon the witness was excused.

76 CHARLES K. ADAMS was called as a witness on behalf of the defendants and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Durbrow:

Q. What is your business, Mr. Adams?
A. Chief Clerk to the General Freight Agent of the Santa Fe, Los Angeles.
Q. How long have you occupied that position?
A. Two years and a half.
Q. You were incumbent in that position then in March, 1914?
A. Yes, sir.
Q. Did you, during the months of March or April, 1914, quote any rates to Campbell's United Shows?
A. Yes, sir.
Q. Between what points?
A. From Phoenix to Prescott to Clarksdale, Kingman and Needles, California.
Q. And did you quote rates to any points west of Needles during those months?
77 A. To Bakersfield and so on up the San Joaquin Valley.
Q. Bakersfield, California?
A. Yes, sir.
Q. And who applied to you for the rates for such a movement?
A. Mr. Goldsworthy, General Agent at Phoenix.
Q. Did you have any negotiations direct with the carnival people?
A. Not for the first contract, moving them to Needles, California.
A. Subsequent contract taking up a portion of that run was negotiated in our office. Yes.
Q. When were you asked for a rate from Phoenix to Needles?
A. March 21st, 1914.
Q. Was a contract executed for that movement?
A. On April 3rd, 1914.
Q. Have you that contract?
A. Yes, sir.
Q. Will you let me have it, please?
78 A. (Witness produces a paper and hands to counsel.) That is the first one.

By Mr. Hardy: No objections. (Paper admitted in evidence and marked defendant's exhibit Number 2.)

By Mr. Durbrow:

Q. Was this contract signed by yourself in behalf of the Santa Fe Railway Company?
A. Yes, sir.
Q. This is your signature?
A. Yes, sir.
Q. Who signed it on behalf of Campbell's United Shows?

A. E. L. Williams was their agent.

Q. Was a subsequent contract executed between the Santa Fe and the Campbell's United Shows, Mr. Adams?

A. Yes, sir.

Q. On what date was that contract executed?

A. April 16th, 1914.

Q. And between what points did you agree to transport Campbell's United Shows?

79 A. From Prescott to Bakersfield, California.

Q. Was this contract executed by yourself or was it executed by Mr. Reinhardt?

A. Mr. Reinhardt, the General Freight Agent, and witnessed by me.

Q. Who executed it on behalf of Campbell's United Shows?

A. Mr. Williams, their general agent.

By the Court:

Q. Now, did the circus or carnival move from Phoenix, Arizona, to Bakersfield, California, under these contracts which were negotiated as early as March, 1914?

A. Yes, sir.

By the Court: The last instrument you have offered as exhibit Number 3 will be admitted.

By Mr. Durbrow: That is all, thank you.

By Mr. Hardy: No questions.

Thereupon the witness was excused.

H. C. HALLMARK was called as a witness on behalf of the defendants and, being first duly sworn, testified as follows:

80 Direct examination.

By Mr. Durbrow:

Q. What is your position, please, Mr. Hallmark.

A. General Freight and Passenger Agent of the Arizona Eastern, and Assistant Freight and Passenger Agent of the Southern Pacific Company.

Q. Were you occupying those same positions in March and April, 1914.

A. I was Assistant General Freight and Passenger Agent of the Arizona Eastern Railroad and Chief Clerk to the Assistant General Freight and Passenger Agent of the Southern Pacific Company at Tucson.

Q. Did you have anything to do with negotiating any contract or quoting any rates to Campbell's United Shows during March and April, 1914?

A. Yes, sir.

Q. And please state when you first met any representative of that organization?

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A. We had negotiations early in February through representatives of the Southern Pacific Company at El Paso. I met Mr. E. L. Williams, General Agent of Campbell's United Shows about March 6th, 1914.

81 Q. Did he ask you for a rate?

A. He asked for a rate at that time.

Q. Between what points, please?

A. Between Tucson and Phoenix, with a probable movement to other points in Arizona and in California, at that time explaining that they were coming from Deming, New Mexico, into Tucson over the El Paso & Southwestern.

Q. That is, at the time he asked you for a rate and asked you to move his show, his carnival company was at Deming, New Mexico?

A. At Deming, New Mexico, yes, sir.

Q. And it subsequently moved into Tucson and thense into Phoenix, did it not?

A. It did.

Q. At what rate did the carnival move from Tucson into Phoenix, Arizona?

A. At a passenger rate of $4.85 per capita. The movement consisted of approximately one hundred and twenty-five people and they carried seven baggage cars. The Southern Pacific passenger tariff introduced in evidence provided for the movement on special train with a minimum of one hundred and twenty-five fares. It furthermore provided for a baggage free movement of one baggage

82 car for each twenty-five persons, with the additional proviso that for extra baggage cars an additional free allowance, they would be transported over the Southern Pacific on the basis of ten fares each to Maricopa. The fare to Maricopa is $3.45. The Arizona Eastern passenger tariff introduced in the record covered special car parties including carnival outfits and carries a provision for special train service on a minimum of one hundred and twenty-five fares, and with the proviso that special baggage cars will be transported free for each twenty-five fares, and extra baggage cars in ad-ition to the free allowance for the equivalent of twenty-five fares, so in the movement there were one hundred and forty-five fares from Tucson to Maricopa and one hundred and seventy-five fares from Maricopa to Phoenix.

Q. Those fares were charged under the tariffs that were on file at that time with the Interstate Commerce Commission and which have been introduced in evidence here?

A. They were.

Q. What character of show is this, Mr. Hallmark?

A. It is a carnival outfit.

Q. And the rate applying to carnivals was charged this show?

A. It was.

83 Q. Now, subsequent to the entry of the order by the Arizona Corporation Commission requiring you to execute a contract with Campbell's United Shows, was such a contract executed on behalf of the Arizona Eastern Railroad Company?

A. It was. The Arizona Eastern drew up a contract on March

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27th, 1914. I had it prepared and secured Mr. Clapp's signature, who was general freight and passenger agent of the Arizona Eastern at the time, and telephoned Mr. Campbell, who was then in Tucson, telling him that while we did not regard the order of the Corporation Commission as legal, the movement involved was small and that rather than get into further controversy, if he would come around, the contract would be ready for his signature.

Q. To whom did you tell this?

A. To Mr. Campbell over the telephone. He said he would come up, and I asked him to come up before 1 o'clock. This was about 12 o'clock on a Saturday, explaining to him that our office closed at 12. He promised to be there before 1 o'clock. I waited until 1:30 and he failed to come, but when I left the office I left the contract in the hands of Mr. Barnes, traveling freight and passenger agent, advising him that when Mr. Campbell came to the office, if he came, to let him sign the contract and give one copy to Campbell and mail copies to the Arizona Corporation Commission with transmittal notice and
84 tariffs which we had prepared. Mr. Campbell, later in the afternoon, Saturday afternoon, came to the office and he declined, so I was told by the clerk in charge of the office, to sign the contract.

By Mr. Dunbrow: That is all, thank you.

Cross-examination.

By Mr. Hardy:

Q. Mr. Hallmark, at the time the order of the Arizona Corporation Commission was entered requiring you to haul the Campbell's United Shows from Tucson to Maricopa and from Maricopa to Phoenix at the rate of $3.00 per train mile, did you have a contract, or contracts, with any other shows or carnival companies?

A. We had a contract; yes, we had a contract with another show.

Q. What show?

A. The Sells-Floto Shows.

Q. Did you have one with A. G. Barnes?

A. Not at that time.

Q. Had you any at any time with Al G. Barnes' shows?

A. Yes, we have had contracts on more than one occasion with Al G. Barnes and with Sells-Floto circus. Both of them are circuses.

85 Q. Had you at any time, previous time, entered into any contract for the movement of the Campbell's Carnival Shows?

A. Yes, about a year prior thereto, but we have not since, on advice of counsel that the passenger tariffs in effect covering carnival outfits, that we should handle them under that tariff.

Q. You had a contract, did you not, effective March 31st, 1914, with the Sells-Floto shows?

A. Yes, we had one; I don't recall the date, but about that time.

Q. Then it is a fact, Mr. Hallmark, that you transported upon the

lines you represent carnival and show companies under special contracts.

A. It is a fact that we transported circuses under special contracts. We have in years past transported carnivals, but have not since we were instructed by our legal department that it would not be proper to do so on carnivals.

Q. Have you applied to the Interstate Commerce Commission for special rate authority to transport carnivals or circuses?

A. We have not.

By Mr. Hardy: I think that is all.

86 Redirect examination.

By Mr. Durbrow:

Q. Mr. Hallmark, will you kindly explain the difference between a carnival and a circus?

A. Why, generally speaking, a circus consists of one big show with possibly additional side shows, with animals and menageries and acrobatic acts by persons or animals. A carnival consists, may consist of one or a series, of one or more entertainment propositions of various kinds. The circus usually carries a large number of highly valued animals both wild and domestic. A carnival carries sometimes none and sometimes a few animals.

Q. A circus usually has its own equipment?

A. A circus usually has its own equipment, and carries its own equipment in the way of cars, both passenger and freight.

By Mr. Durbrow: That is all, thank you.

By the Court:

Q. Mr. Hallmark, the conversation you had with Mr. Campbell about twelve o'clock in the forenoon over the telephone—repeat that please.

A. On March 7, 1914, as I have it here—anyway it was the
87 last Saturday in March—I called up Mr. Campbell on the telephone, whose carnival then exhibited at the Elysian Grove in Tucson. I tried to get him earlier than that, put in a call for him, and we finally got him about twelve o'clock and I told him that while we didn't think the Commissioner's order was legal or proper, that so long as the order had been issued and the movement was light and the matter involved was small, rather than go to the further annoyance and expense of contesting, if he would come up we would sign up a contract with him in line with the order of the Corporation Commission for the movement into Phoenix. It was on the Arizona Eastern. He said that he would come up. I asked him to come by one o'clock as the office closed at one and we wanted to get home for lunch. I waited until one thirty and Mr. Campbell failed to come.

By Mr. Durbrow: That is our case, if your Honor please.

By Mr. Hardy: We have no rebuttal. I will waive the opening argument and permit counsel to make his.

(Title of Court and Cause.)

STATE OF ARIZONA,
County of Maricopa, ss:

88 I, the undersigned, official reporter of the Superior Court of Maricopa County, State of Arizona, do hereby certify that the foregoing pages, numbered one (1) to nineteen (19), inclusive, constitute a full, true and correct transcription of my shorthand notes taken upon the trial of the above entitled cause, taken in the above entitled court on the date therein mentioned, which said shorthand notes contain a full, true and correct record of the proceedings had upon said trial, including all questions propounded to the witnesses and the witnesses' answers thereto, together with the objections and remarks of counsel, and the rulings and the remarks of the Court thereon, all to the best of my skill and ability.

Dated this 26th day of January, A. D. 1916.

B. L. RUDDEROW,
Official Reporter.

(Title of Court and Cause.)

STATE OF ARIZONA,
County of Maricopa, ss:

89 The above and foregoing transcript of the reporter's notes having been duly filed in this cause in the office of the Clerk of the Superior Court of Maricopa County, and notice of said filing given to the parties in said cause, and no statement having been filed or served agreeing to the correctness or correctness and sufficiency of the said reporter's transcript or suggesting amendments thereof within the time provided by law, and said transcript of the reporter's notes having been duly presented to me by the clerk of the Superior Court of Maricopa County, Arizona, this 10th day of April, 1916, and finding the said transcript to be correct, I hereby certify that the transcript of the reporter's notes is correct.

Dated at Phenix, Arizona, this 10th day of April, A. D. 1916.

R. C. STANFORD, *Judge.*

Endorsements.

Title of Court and Cause—Nos. 7863 and 7864.

Reporter's Transcript.

Filed Mar. 20, 1916. James Miller, Jr., Clerk, by G. F. Macdonald, Deputy.

Refiled by R. C. Stanford Apr. 10, 1916. James Miller, Jr., Clerk, by G. F. Macdonald, Deputy.

No. 1529—Supreme Court. Filed May 10, 1916. C. F. Leonard, Clerk Supreme Court.

90 PLAINTIFF'S EXHIBIT "A."

Complaint.

In the Superior Court of the State of Arizona in and for the County of Maricopa.

Docket No. 165.

STATE OF ARIZONA, Plaintiff,

vs.

ARIZONA EASTERN RAILROAD COMPANY, a Corporation, Defendant.

Plaintiff for cause of action complains and alleges:

I.

That defendant is a corporation duly organized and existing under and by virtue of the laws of the Territories of Arizona and New Mexico, and is duly authorized to transact business within the State of Arizona.

II.

That on the 20th day of March, 1914 there was promulgated, under the authority and seal of the Arizona Corporation Commission, in the matter of the rate to be charged Campbell's United Shows by the Southern Pacific Company and the Arizona Eastern Railroad Company for transportation in Arizona, Docket
91 No. 165, an order to show cause before the Arizona Corporation Commission, on or before ten o'clock A. M., Monday, March 23rd, 1914, why the said Arizona Corporation Commission should not issue special rate authority compelling defendant to publish, on one day's notice, a rate for the transportation of Campbell's United Shows, consisting of eighteen cars and to furnish such equipment as may be necessary in the State of Arizona at the rate of $3.00 per thile from Maricopa, Arizona to Phoenix, Arizona, a copy of which order is hereunto attached, marked Exhibit "A," and, by reference, made a part of this complaint.

III.

Agreeable to the order of the Arizona Corporation Commission, as alleged in paragraph II of this complaint, defendant appeared before it, at the time and place therein specified, and, after a full and fair hearing, it was ordered that defendant transport the cars, property, employees and attendants of Campbell's United Shows, and to extend to said Campbell's United Shows the usual privileges in the movement of advance agents, from Maricopa, Arizona to

92 Phoenix, Arizona at a rate of $3.00 per train mile for the entire service, as appears by the opinion and order of the Arizona Corporation Commission, promulgated under its authority and seal on the 25th day of March, 1914, a copy of which opinion and order is hereunto attached, marked Exhibit "B," and, by reference, made a part of this complaint.

Plaintiff further alleges that defendant's motion for a rehearing of the said order, promulgated under the authority and seal of the Arizona Corporation Commission on the 25th day of March, 1914, was denied, as appears from a copy of said order which is hereunto attached, marked Exhibit "C," and, by reference, made a part of this complaint.

IV.

Plaintiff further alleges that said order of the Arizona Corporation Commission, promulgated under its authority and seal on the 25th day of March, 1914, commanding defendant to transport the cars, property, employees and attendants of Campbell's United Shows from Maricopa, Arizona, to Phoenix, Arizona, and to extend to said Campbell's United Shows the usual privileges in the 93 movement of advance agents for a total amount not to exceed $3.00 per train mile for the entire service, was not complied with, in pursuance of which the Arizona Corporation Commission, upon the petition and information of G. P. Bullard, Attorney General for Arizona, a copy of which is hereunto attached, marked Exhibit "D," and, by reference, made a part of this complaint, issued a citation to defendant to appear before it on the 13th day of April, 1914 at ten o'clock A. M. and show cause why it should not be punished for contempt, as in said petition alleged, a copy of which order to show cause is hereunto attached, marked Exhibit "E," and, by reference, made a part of this complaint; that at the hearing of said order on the 13th day of April, 1914, to show cause why it should not be punished for contempt of the Arizona Corporation Commission, it was adjudged that the order, promulgated under its authority and seal on the 25th day of March, 1914, had not been complied with, in consequence of which, and as a result of the hearing conducted on the 25th day of April, 1914, the defendant was declared in contempt of the said Arizona Corporation Commission, and, on the 16th day of May, 1914, adjudged to pay a fine in the sum of Five Hundred ($500.00) Dollars, to be 94 paid and satisfied on or before June 1st, 1914 or, in default of the payment of the same before said date, to be proceeded against for the collection of the same by the Attorney General, as provided by law, a copy of which order adjudging the defendant in contempt of the Arizona Corporation Commission is hereunto attached, marked Exhibit "F," and, by reference, made a part of this complaint.

V.

Plaintiff further alleges that the said order of the Arizona Corporation Commission, promulgated under its authority and seal on

the 16th day of May, 1914, has not been complied with by defendant and that it has refused and still continues to refuse to pay plaintiff the sum of Five Hundred ($500.00) Dollars imposed upon it by the Arizona Corporation Commission for a contempt of its order of March 25th, 1914.

Wherefore, plaintiff prays that it recover and have judgment against the defendant, Arizona Eastern Railroad Company, a corporation, for the sum of Five Hundred ($500.00) Dollars, together with its costs and disbursements in this behalf expended and for such other and further relief that seems just and meet to the
95 court in the premises.

G. P. BULLARD,
Attorney General.
LESLIE C. HARDY,
Assistant Attorney General.

Filed June 24, 1914.

Complaint.

In the Superior Court of the State of Arizona in and for the County of Maricopa.

Docket No. 165.

STATE OF ARIZONA, Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, Defendant.

Plaintiff for cause of action complains and alleges:

I.

That defendant is a corporation duly organized and existing under and by virtue of the laws of the State of Kentucky, and is duly authorized to transact business within the State of Arizona.

96 II.

That on the 20th day of March, 1914 there was promulgated, under the authority and seal of the Arizona Corporation Commission, in the matter of the rate to be charged Campbell's United Shows by the Southern Pacific Company and the Arizona Eastern Railway Company for transportation in Arizona, Docket No. 165, an order to show cause before the Arizona Corporation Commission, on or before ten o'clock A. M., Monday, March 23rd, 1914, why the said Arizona Corporation Commission should not issue special rate authority compelling defendant to publish, on one day's notice, a rate for the transportation of Campbell's United Shows, consisting of eighteen cars and to furnish such equipment as may be

necessary in the State of Arizona at the rate of $3.00 per mile from Tucson, Arizona to Maricopa, Arizona, a copy of which order is hereunto attached, marked Exhibit "A," and, by reference, made a part of this complaint.

III.

Agreeable to the order of the Arizona Corporation Commission, as alleged in paragraph II of this complaint, defendant ap-
97 peared before it, at the time and place therein specified, and after a full and fair hearing, it was ordered that defendant transport the cars, property, employees and attendants of Campbell's United Shows, and to extend to said Campbell's United Shows the usual privileges in the movement of advance agents, from Tucson, Arizona to Maricopa, Arizona at a rate of $3.00 per train mile for the entire service, as appears by the opinion and order of the Arizona Corporation Commission, promulgated under its authority and seal on the 25th day of March, 1914, a copy of which opinion and order is hereunto attached, marked Exhibit "B," and, by reference, made a part of this complaint.

Plaintiff further alleges that defendant's motion for a rehearing of the said order, promulgated under the authority and seal of the Arizona Corporation Commission on the 25th day of March, 1914, was denied, as appears from a copy of said order which is hereunto attached, marked Exhibit "C," and, by reference, made a part of this complaint.

IV.

Plaintiff further alleges that said order of the Arizona Corporation Commission, promulgated under its authority and seal
98 on the 25th day of March, 1914, commanding defendant to transport the cars, property, employees and attendants of Campbell's United Shows from Tucson, Arizona, to Maricopa, Arizona, and to extend to said Campbell's United Shows the usual privileges in the movement of advance agents for a total amount not to exceed $3.00 per train mile for the entire service, was not complied with, in pursuance of which the Arizona Corporation Commission, upon the petition and information of G. P. Bullard, Attorney General for Arizona, a copy of which is hereunto attached, marked Exhibit "D," and, by reference, made a part of this complaint, issued a citation to defendant to appear before it on the 13th day of April, 1914 at ten o'clock A. M. and show cause why it should not be punished for contempt, as in said petition alleged, a copy of which order to show cause is hereunto attached, marked Exhibit "E," and, by reference, made a part of this complaint; that at the hearing of said order on the 13th day of April, 1914 to show cause why it should not be punished for contempt of the Arizona Corporation Commission, it was adjudged that the
99 order, promulgated under its authority and seal on the 25th day of March, 1914, had not been complied with, in consequence of which, and as a result of the hearing conducted on the

25th day of April, 1914, the defendant was declared in contempt of the said Arizona Corporation Commission and, on the 16th day of May, 1914, adjudged to pay a fine in the sum of Fifteen Hundred ($1500.00) Dollars, to be paid and satisfied on or before June 1st, 1914, or, in default of the payment of the same before said date, to be proceeded against for the collection of the same by the Attorney General, as provided by law, a copy of which order adjudging the defendant in contempt of the Arizona Corporation Commission is hereunto attached, marked Exhibit "F," and, by reference, made a part of this complaint.

V.

Plaintiff further alleges that the said order of the Arizona Corporation Commission, promulgated under its authority and seal on the 16th day of May, 1914, has not been complied with by defendant and that it has refused and still continues to refuse to pay plaintiff the sum of Fifteen Hundred ($1500.00) Dollars imposed upon it by the Arizona Corporation Commission for a con-
100 tempt of its order of March 25th, 1914.

Wherefore, plaintiff prays that it recover and have judgment against the defendant, Southern Pacific Company, a corporation, for the sum of Fifteen Hundred ($1500.00) Dollars, together with its costs and disbursements in this behalf expended and for such other and further relief that seems just and meet to the Court in the premises.

G. P. BULLARD,
Attorney General.
LESLIE C. HARDY,
Assistant Attorney General.

Filed June 20, 1914.

Before the Arizona Corporation Commission.

In Re A. C. C. Docket No. 165.

STATE OF ARIZONA at the Relation of G. P. Bullard, Attorney General, Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY and ARIZONA EASTERN RAILROAD COMPANY, Corporations, Defendants.

In Contempt.

It appearing that the defendants above named were violating the provisions of Chapter II, Revised Statutes of Arizona, 1913,
101 with respect to transportation of property of Campbell's United Shows, an order was issued March 20, 1914, directed to Southern Pacific Company and Arizona Eastern R. R. Co., com-

manding said companies to appear before the Commission, at its office in Phœnix, Arizona, on or before 10:00 o'clock A. M., March 23, 1914, to show cause why this Commission should not issue an order as follows:

"In consideration of facts shown, the Southern Pacific Company and the Arizona Eastern Railroad Company are hereby ordered to publish, on one day's notice, the following rate for the transportation of Campbell's United Shows, consisting of eighteen (18) cars, and to furnish such equipment as may be necessary, within the State of Arizona:

"Tucson, Arizona, to Maricopa, Arizona, $3.00 per mile.

"Maricopa, Arizona, to Phœnix, Arizona, $3.00 per mile."

Pursuant to said notice, a hearing was had thereon, at which hearing the defendants were represented by counsel and traffic agents, and full opportunity was given those in interest to be heard. A record of the proceedings was made and is contained in the Commission's files. Upon the record, the Commission, on March 25, 1914, rendered its opinion and order, Docket No. 165, said opinion and order being duly served upon defendants. The
102 opinion reviewed the testimony and the order based upon same was as follows:

"It is therefore ordered:

"That the Southern Pacific Company and Arizona Eastern Railroad Company transport the cars, property, employees and attendants of Campbell's United Shows from Tucson, Arizona, via Maricopa, to Phœnix, Arizona, and to extend to the said Campbell's United Shows the usual privileges in the movement of advance agents, for a total amount not to exceed $3.00 per train mile for the entire service.

It is understood that the shipment will consist of not to exceed four coaches, four large box cars and ten flat cars, and it is further understood that the Southern Pacific Company and Arizona Eastern Railroad Company may enter into a contract covering this transportation, the terms of which shall not be in substantial variance with the contract now existing between the Arizona Eastern Railroad Company and Sells Floto Shows Company, with respect to details as to responsibility, service and conditions, copy of said contract being on file with the Commission, and made on March 4, 1914, by and between the Arizona Eastern Railroad Company and Sells Floto Shows Company.

It is further ordered:

That, upon submission of evidence that any charge or charges have been exacted by respondent companies for transportation of advance agents or employees, at variance with contract herein referred to, made by respondent, Arizona Eastern Railroad Company, with Sells Floto Shows Company, that the amount or amounts so collected shall be refunded to Campbell's United Shows."

It appearing that the defendants herein had wilfully ignored and refused to comply with the terms of the said order, and the Attorney General for the State of Arizona having been advised of the facts, and to take such action as the laws require

103 in such cases, the Attorney General filed on the 31st day of March, 1914, with this Commission, a petition praying that the Commission issue citation to the defendants, Southern Pacific Company and Arizona Eastern Railroad Company, to appear and show cause why they should not be punished for contempt, as by law provided. An Order to Show Cause was directed to Southern Pacific Company and Arizona Eastern Railroad Company, and their officers, agents, employes and attorneys, on April 1, 1914, reading as follows:

"Petition having been filed with this Commission, by G. P. Bullard, Attorney General for the State of Arizona, charging defendants, Southern Pacific Company and Arizona Eastern Railroad Company, with contempt of an order of this Commission, and sufficient cause appearing therefor,

It is ordered:

That the said defendants, Southern Pacific Company and Arizona Eastern Railroad Company, be and appear before this Commission, in open session, at the office thereof, on Monday, the Thirteenth day of April, 1914, at 10:00 o'clock A. M., to show cause why they should not be punished for contempt, as in said petition alleged.

It is further ordered:

That a copy of petition heretofore filed, and copy of this order be served upon said defendants at least ten days before the date herein fixed for their appearance before this Commission."

This order was duly served and on April 13th a hearing was had thereon, the State being represented by its Attorney
104 General, G. P. Bullard, and the defendants by their counsel, C. W. Durbrow, J. C. Forest and V. O. Baker, representing Southern Pacific Company, and Gibson Taylor, representing Arizona Eastern Railroad Company. Campbell's United Shows was represented by Benton Dick, of Tucson. Representatives of Campbell's United Shows and traffic officials of defendants testified.

It was shown that the Campbell's United Shows moved over the lines of the El Paso & Southwestern System, reaching Tucson the latter part of March, 1914, under Intrastate Tariff No. 1458, which said tariff was issued upon this Commission's authority No. 307. The shipment consisted of four coaches, ten flat cars and four large box cars, the number of cars and their contents being the same as was moved from Tucson to Phoenix by defendants. Movements from Douglas to Tucson, with a side branch line haul to Bisbee, total distance being 138 miles, total charge $100.00, made the rate per train mile $2.80. From the records of the Commission, it is observed that the El Paso & Southwestern System ap-
105 plied to this Commission for its approval of the rate, which appears to have been voluntarily made and offered to the Campbell's United Shows.

Mr. Campbell testified that, as near as he can remember, defendants moved his show property in 1913, from Tucson to Phoenix via Mesa, for about $435.00. This movement involves 135 miles of haul with one more terminal service than was rendered in the movement directly from Tucson to Phoenix. Defendants in 1913 charged $3.22

per train mile for the transportation of this show including the rendition of the additional terminal service incident to stoppage at Mesa.

In view of the rate made by the El Paso & Southwestern, of $2.80 per train mile, with one stoppage in transit and a side line service, and in view of the rate made by these defendants last year, it cannot be said that the rate ordered in by the Commission, for the movement this year, of $3.00 per train mile, is not fully compensatory and in all respects a reasonable rate. It appears that notwithstanding the order issued by the Commission, that defendants should render the service required for $3.00 per mile, or a total of $363.00,
106 that defendants demanded and collected from the Campbell's United Shows the sum of $745.25. It is claimed that this rate is published in passenger tariffs of defendants providing for movement of special baggage cars. Defendants did not furnish baggage cars, nor did they handle the freight cars as a passenger train. Witness Lovejoy, Chief Clerk of the Superintendent, Southern Pacific Company, stated the train ran as an extra freight; that "any train containing more than four freight cars is put on freight schedule, and is considered an extra freight."

For the purposes of this order, it does not seem necessary to further review the facts in the case other than the fact that the Commission finds that defendants, Southern Pacific Company and Arizona Eastern Railroad Company, wilfully and knowingly violated the order of the Commission issued and served, in Docket No. 165.

Upon the facts, fully supported by the records, and in view of the provisions of Paragraph 2357, Chapter 11, Revised Statutes of Arizona, 1913, the Commission has no option but to impose a fine against defendants.

It is therefore ordered: That the Southern Pacific Com-
107 pany be, and it is hereby declared in contempt of this Commission's order, in Docket No. 165, and the said Company be, and it is hereby fined the sum of Fifteen Hundred Dollars ($1500.00).

It is further ordered: That Arizona Eastern Railroad Company be and it is hereby declared in contempt of this Commission's order, in Docket No. 165, and that the said company be, and it is hereby fined the sum of Five Hundred Dollars ($500.00).

It is further ordered: That copies of this order be served upon Southern Pacific Company and Arizona Eastern Railroad Company, and the Attorney General of the State of Arizona, and unless the fines, as herein imposed, be paid and satisfied on or before June 1, 1914, that the Attorney General shall proceed to the collection of same as provided by law.

ARIZONA CORPORATION COMMISSION.
——— ———, *Chairman;*
A. W. COLE,
F. A. JONES,
Commissioners.

Dated at Phoenix, Arizona, this 16th day of May, 1914.

Attest:
FRANK DE SOUZA, *Secretary.*

108 Before the Arizona Corporation Commission.

Docket No. 165.

In the Matter of Rate to Be Charged Campbell's United Shows by Southern Pacific Company and Arizona Eastern Railroad Company for Transportation in Arizona.

Order to Show Cause.

To Southern Pacific Company and Arizona Eastern Railroad Company and their Officers, Agents, Employees and Attorneys:

Petition having been filed with this Commission, by G. P. Bullard, Attorney General for the State of Arizona, charging Defendants, Southern Pacific Company and Arizona Eastern Railroad Company, with contempt of an order of this Commission, and sufficient cause appearing therefor,

It is ordered:

That the said Defendants, Southern Pacific Company and Arizona Eastern Railroad Company, be and appear before this Commission, in open session, at the office thereof, on Monday, the Thirteenth day of April, 1914, at 10:00 o'clock A. M., to show cause why they should not be punished for contempt, as in said petition alleged.

109 It is further ordered: That a copy of petition heretofore filed, and copy of this Order be served upon said Defendants at least ten days before the date herein fixed for their appearance before this Commission.

ARIZONA CORPORATION COMMISSION,

[SEAL.] ——— ———, *Chairman;*

A. W. COLE,

F. A. JONES,

Commissioners.

Dated at Phoenix, Arizona, this 1st day of April, 1914.

Attest:

FRANK DE SOUZA, *Secretary.*

Before the Arizona Corporation Commission.

In Re A. C. C. Docket No. 165.

STATE OF ARIZONA at the Relation of G. P. Bullard, Attorney General, Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY and ARIZONA EASTERN RAILROAD COMPANY, Corporations, Defendants.

In Contempt.

To the Honorable the Arizona Corporation Commission:

110 The State of Arizona, at the relation of G. P. Bullard, Attorney General, plaintiff in the above entitled case of action,

respectfully shows that heretofore, to-wit, on the 25th day of March, 1914, the Commission, pursuant to law, made and entered into an order which provides, among other things, as follows:

"It is therefore ordered that the Southern Pacific Company and Arizona Eastern Railroad Company transport the cars, property, employees and attendants of Campbell's United Shows, from Tucson, Arizona, via Maricopa, to Phoenix, Arizona, and to extend to the said Campbell's United Shows the usual privileges in the movement of advance agents, for a total amount not to exceed $3.00 per train mile for the entire service.

"It is understood that the shipment will consist of not to exceed four coaches, four large box cars and ten flat cars, and it is further understood that the Southern Pacific Company and Arizona Eastern Railroad Company may enter into a contract covering this transportation, the terms of which shall not be in substantial variance with the contract now existing between the Arizona Eastern Railroad Company and Sells-Floto Shows Company, with respect to details as to responsibility, service and conditions, copy of said contract being on file with the Commission, and made on March 4, 1914, by and between the Arizona Eastern Railroad Company and Sells-Floto Shows Company."

Plaintiff further shows to this Honorable Commission that, in this respect, said order of said Commission has not been complied with by the defendants, notwithstanding the fact that Campbell's
111 United Shows have made due application to defendants to transport the cars, property, employees and attendants of said Campbell's United Shows from Tucson, Arizona, via Maricopa, to Phoenix, Arizona, and did make demand upon said defendants to extend to the said Campbell's United Shows the usual privileges in the movement of advance agents, for a total amount not to exceed $3.00 per train mile for the entire service, and the said shipment, which was so demanded by Campbell's United Shows over the said defendants' — did not consist of to exceed four coaches, four large box cars and ten flat cars.

Dated at Phoenix, Arizona, this 31st day of March, 1914.

Filed Mar. 31, 1914.

Before the Arizona Corporation Commission.

Docket No. 165.

Plaintiff further alleges that, notwithstanding said demand on the part of Campbell's United Shows, these defendants refused to enter into any contract with the said Campbell's United Shows, covering said transportation, of any nature, and they did refuse to transport the cars, property, employees and attendants of Campbell's United Shows from Tucson, Arizona, via Maricopa, to Phoenix, Arizona, and that the said defendants did refuse the said Campbell's United Shows the usual privileges in the movement of advance agents, for a

112 total amount not to exceed $3.00 per train mile for the entire service;

And that the said defendants did refuse to make such transportation of Campbell's United Shows, under the Order of said Commission, hereinbefore set forth.

Wherefore, Plaintiff prays that the Commission issue citation to the defendants, Southern Pacific Company and Arizona Eastern Railroad Company, to appear before it at such time as the Commission shall fix, and show cause why it should not punish them for contempt, as by law provided.

G. P. BULLARD,
Attorney General for the State of Arizona.

In the Matter of Rate to be Charged Campbell's United Shows by Southern Pacific Company and Arizona Eastern Railroad Company for Transportation in Arizona.

Application of the Southern Pacific Company, by its At-
113 torney, Frank Cox, Esquire, for a rehearing of the above entitled matter, was filed on the evening of March 28, 1914.

The grounds set forth, upon which applicants rely for a rehearing, together with the records before the Commission, having been fully considered, and it appearing to the Commission that its original order in the premises is based upon facts and the law,

It is ordered: That the application of the Southern Pacific Company, one of the respondents herein, moving for a rehearing on the Order heretofore made on the 25th day of March, 1914, is hereby denied.

ARIZONA CORPORATION COMMISSION.
[SEAL.] W. P. GEARY, *Chairman;*

F. A. JONES,
Commissioners.

Dated at Phoenix, Arizona, this 28th day of March, 1914.

Attest:
FRANK DE SOUZA, *Secretary.*

114 Before the Arizona Corporation Commission.

Docket No. 165.

In the Matter of Rate to be Charged Campbell's United Shows by Southern Pacific Company and Arizona Eastern Railroad Company for Transportation in Arizona.

I, Frank De Souza, Secretary of the Arizona Corporation Commission, do hereby certify that copy of Opinion and Order of this Commission in above-mentioned docket, dated March 25, 1914, was served upon parties in interest as follows:

One copy delivered to Frank Cox, Attorney for Southern Pacific, at 11:05 A. M., March 26, 1914.

One copy delivered to A. R. Gatter, General Agent for the Southern Pacific Co., at 11:10 A. M., March 26, 1914.

One copy registered and sent to E. W. Clapp, General Freight Agent, Southern Pacific, March 26, 1914.

One copy registered and sent to Gilson Taylor, Secretary, Arizona Eastern, March 26, 1914.

FRANK DE SOUZA, *Secretary.*

Dated at Phoenix, Arizona, this 28th day of March, 1914.

115 Before the Arizona Corporation Commission.

Docket No. 165.

In the Matter of Rate to be Charged Campbell's United Shows by Southern Pacific Company and Arizona Eastern Railroad Company for Transportation in Arizona.

Comes now the Southern Pacific Company, and moves the Corporation Commission for the State of Arizona for a re-hearing on the order heretofore made on the 25th day of March, 1914, in the above styled cause, requiring the Southern Pacific Company to haul Campbell's United Shows over its line of railroad from Tucson, Arizona to Maricopa, Arizona, at the rate of three dollars per train mile, and to furnish other facilities in said order stated, on the grounds:

I.

That there was insufficient evidence presented to the Commission to justify making said order.

II.

That the said Commission had no jurisdiction to enter said order.

III.

That the Southern Pacific Company has no circus contract
116 with Sells Floto Shows on file with the Arizona Corporation Commission; that the only contract Southern Pacific Company has with Sells Floto Shows being one on file with the Interstate Commerce Commission, providing for mileage rate of $3.50 per train mile.

IV.

That no intrastate tariffs are on file with the Arizona Corporation Commission, showing rate for movement of privately owned equipment in circus trains or otherwise, or obligating company to run special freight train service.

Wherefore, the Southern Pacific Company prays that said order may be vacated.

FRANK COX,
Attorney for Southern Pacific Company.

Dated and Filed Mar. 28, 1914.

Before the Arizona Corporation Commission.

Docket No. 165.

In the Matter of Rate to be Charged Campbell's United Shows by the Southern Pacific Company and the Arizona Eastern Railroad Company for Transportation in Arizona.

117 *Opinion and Order.*

F. A. JONES, *Commissioner:*

The management of Campbell's United Shows complained informally, March 7, 1914, that the Southern Pacific Company and the Arizona Eastern Railroad Company declined to transport the cars, equipment and employees of complainant from Tucson, Arizona to Phœnix, Arizona, whereupon the Commission, by telegraph, requested the Arizona Eastern R. R. Co. to advise upon what authority they declined to enter into a contract with Campbell's United Shows, to which reply was made as follows:

"We have not declined to enter into contract for movement Campbell Shows. Traffic Manager who handles all circus contracts and movements on S. P. was telephoned yesterday for terms and contract to cover movement to Maricopa and Williams was so advised before he left here. Also say that Arizona Eastern will make contract as soon as arrangements are made for movement to Junction."

General Agent E. L. Williams of the Campbell Shows again complained to the Commission on March 18, 1914, that the above-named carriers still declined to make a contract or agreement at the usual circus rates, for the transportation of this show from Tucson
118 to Phœnix. The Commission again wired the Arizona Eastern as follows:

"Williams, General Agent, Campbell's Shows, complains that your company declines to make contract at customary circus movement rates for Campbell Shows, Tucson to Phœnix. Please advise by wire to-day reasons for discrimination."

to which telegram, General Freight Agent, E. W. Clapp of the Arizona Eastern replied as follows:

"Tucson, Ariz.,

Mar. 19, 1914.

"Arizona Corporation Commission, Phœnix:

"As private carrier it is not our practice to enter into contract with two circuses moving over line less than thirty days apart ex-

cept upon mutual understanding between the circuses. Williams is familiar with this practice and Campbell has heretofore insisted on our following it. The Commission will appreciate reasonableness of this rule when applied to circuses and like organizations."

Under date of March 18, 1914, the Commission was advised by Mr. Clapp as follows:

"Mr. Luce requests that I say Southern Pacific has never held itself out as common carrier of circus or kindred shows and such movements are subject to special contracts executed by Southern Pacific on its part as private carriers. Our counsel advises that no Federal or State Commissions have been vested with power to regulate movements. Regret that we cannot lawfully or consistently depart from our general policy in this instance."

119 The Commission wired Mr. Clapp, under date of March 19, 1914, as follows:

"Please advise reason for moving Sells Floto under reduced contract rate and demanding full tariff rate for movement Campbell's Shows by Arizona Eastern and Southern Pacific. See Section 19, Chapter 90, Session Laws, First Legislature, State of Arizona."

The carriers having denied the jurisdiction of the Commission with respect to transportation of certain classes of freight within the State, and having declined to *prove* rates that, in the opinion of the Commission are just, reasonable and non-discriminatory, an order was issued commanding the Southern Pacific Company and Arizona Eastern Railroad Company to appear before the Commission on March 23, 1914, and show cause why this Commission should not issue a special rate order as follows:

"Special Rate Authority No. —.

"In consideration of facts shown, the Southern Pacific Company and the Arizona Eastern Railroad Company are hereby ordered to publish on one day's notice the following rate for the transportation of Campbell's United Shows, consisting of eighteen (18) cars, and to furnish such equipment as may be necessary, within the State of Arizona:

"Tucson, Arizona, to Maricopa, Arizona, $3.00 per mile.

"Maricopa, Arizona, to Phoenix, Arizona, $3.00 per mile."

The matter came on for hearing at 10:00 o'clock A. M., Monday, March 23, 1914, in the office of the Commission, at which
120 time and place, V. O. Baker, Attorney, E. W. Clapp, General Freight Agent and A. G. Hallmark, Assistant General Freight Agent, appeared for the respondent carriers, and E. L. Williams for Campbell's United Shows. General Freight Agent, J. G. Stubbs, of the Southern Pacific Company was present. E. L. Williams testified, on behalf of Campbell's United Shows, to the effect that he had called on Mr. Hallmark several times prior to his making complaint to the Commission; that Mr. Hallmark informed him Sells Floto had a thirty-day clause over him, (meaning Camp-

bell Shows), and that he could not move the Campbell Shows; that there was some agreement between western roads to this effect. Mr. Hallmark informed him that he had been notified not to make any contract as a common carrier. Mr. Williams explained the situation in which this would leave the Campbell Shows, and agreed to go to any point other than Phoenix on the line of his route westward via Phoenix to California. Mr. Hallmark suggested Nogales, which was not acceptable to the show people, being sixty miles south of their direct line. Mr. Williams agreed to go to Ray, a point on
121 the Arizona Eastern, East of Phoenix, which Mr. Hallmark declined to agree to saying, "No, you will interfere with Sells Floto excursion rates." The only reasons assigned by the carriers for refusal to transport the Campbell Shows to Phoenix was that such movement would interfere with the Sells Floto shows at Phoenix, and the reason assigned for refusal to move them to Ray was that it would interfere with the railroad's excursion rates to Phoenix. From testimony, it appears that, after several fruitless efforts to secure a promise of service, the carriers finally agreed that they would move them under what the carriers claim to be their regularly established rates, being Class A, which amounts to approximately $90.00 per car, or $1,400.00 for the movement of 18 cars, which does not include transportation of some one hundred or one hundred and ten people. Testimony shows that transportation was furnished by the El Paso and Southwestern Railroad into Tucson, for the same shipment, at $3.00 per train mile for 18 cars and contents, and the necessary agents and employees, and that the El Paso and Southwestern agreed to move them under special service for $3.50 per mile.

122 Mr. Williams further testified that the Arizona Eastern and Southern Pacific Company moved the Campbell Shows last year from Tucson to Mesa and from Mesa to Phoenix for $185.00 total charge, and that earlier in the negotiations between the show people and the respondent carriers, Mr. Hallmark informed Mr. Williams that the charge this year would be about $200.00 for the same movement, as he had one more car. Mr. Williams testified to the effect that he had been promised by the Santa Fe, for movement of his shows from Phoenix, Northward and Westward, substantially the same rates as were made by the El Paso and Southwestern Railroad for handling into Tucson.

It is of record that the Campbell Shows have made all arrangements for opening in Phoenix on March 30, 1914, having secured the necessary city license, and that the Campbell people will be in readiness to be moved at any time on March 29, 1914, that may suit the convenience of the carriers.

The railroads offer no testimony in support of their position nor any rebuttal of the testimony given on behalf of the Campbell Shows. Counsel for carriers argued that they were not com-
123 mon carriers and held to the opinion that the Commission is without jurisdiction, in support of which they asked permission to file brief, which permission was granted. This brief is now before the Commission, wherein certain cases are cited in sup-

port of their contention that the Arizona Corporation Commission has no jurisdiction and is not vested with jurisdiction to prescribe rates for circuses and carnival shows, and that railroads transporting such property are not acting as common carriers when so doing. The Interstate Commerce Commission, in its Administrative Rules, has this to say with respect to the transportation of circus outfits:

"The Act to regulate commerce, as amended June 29, 1906, applies to the transportation of circuses and other show outfits, but the Commission recognizes the peculiar nature of this traffic and the difficulty of establishing rates thereon in advance of shippers' request describing the character and volume of the traffic offered, and has, therefore, entered a general order authorizing carriers to establish rates on circuses and other show outfits by tariff, to become effective one day after filing thereof with the commission, and relieving them from the duty of posting such tariffs in their stations. Such tariff may consist of a proper title page reading "as per copy of contract attached," and to it may be attached a copy of the contract under which the circus is moved. As far as practicable general rules or regulations governing the fixing of such rates should be regularly published and filed."

121 From this, it appears that the Interstate Commerce Commission views the transportation of circuses as being subject to the Act to Regulate Commerce. We cannot see how any other conclusion can be reached, from the reading of the Act referred to. The fact that the Commission has authorized carriers to issue rates under less than the statutory notice of thirty days, does not in any particular authorize a departure from the provisions of the Act to Regulate Commerce, prescribing just and reasonable rates, and that rates must be equal and fair and not discriminatory or preferential as between shippers. So far as the laws of Arizona are concerned, there are both Constitutional and statutory prohibitions against discrimination. The laws expressly and clearly state that all charges must be just and reasonable. Section 19, Chapter 90, First Session, 1912, declares as follows:

"No public service corporation shall, as to rates, charges, service, facilities or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage. No public service corporation shall establish or maintain any unreasonable difference as to rates, charges, service, facilities or in any other respect, either as between localities or as between classes of service. The Commission shall have the power to determine any question of fact arising under this Section."

125 Chapter 90 defines "Transportation of Property," "Railroad," "Common carrier" and "Railroad corporation," and there is nothing therein that could be interpreted or construed as permitting a railroad company, at its option, to declare itself a private carrier of one class of traffic, or that it could at its own pleasure be a private carrier of certain property on one day and a common carrier of the same property on another day. It is clearly the duty of a common carrier to transport property when offered and to do so at reasonable and just charges, which shall be open and equal to

all shippers. Any assumption to the contrary would at once destroy the laws applicable to transportation services rendered by public service corporations. If carriers could say that they were not common carriers of circus outfits, or analogous shipments, they could, with equal propriety, say that they were not common carriers of any other class of property that they might not be pleased to accept.

It appears from the record in this case that these carriers would have transported this shipment to Nogales under the usual rates and terms accorded such movements; that the refusal to move the
126 shipment to Phœnix was because of a contract entered into by these carriers with another show. The reasons assigned for not moving the Campbell Shows to Ray was because it would interfere with excursion rates to be made on account of the Sells Floto show at Phœnix. While the record is not clear as to the manner of interference, it can be assumed that a show operating in Ray might result in less people travelling from Ray to Phœnix to attend the Sells Floto exhibition, which would naturally result in the loss of some passenger revenue to the Arizona Eastern. It seems unnecessary to comment at any length on these two reasons assigned. Neither of them is sound or tenable. If the Southern Pacific Company and the Arizona Eastern R. R. Company have made a contract with the Sells Floto circus, wherein they have agreed not to transport another circus within thirty days of that period, they have entered into a contract in restraint of trade, and it is not enforceable. The only question in this matter in which the Commission is concerned, is the determination of a reasonable rate. We hold that it is the duty of these carriers, and of all carriers, to transport circuses and other trans-
127 portable property under reasonable and equal rates. The Arizona Eastern did not deny that it had offered to transport this circus at approximately $200.00, including the employees and attendants, and providing for the usual transportation of advance agents and bill posters. We have before us the rates named by the El Paso and Southwestern Railroad for a movement of this show from Douglas to Bisbee, and from Bisbee to Tucson, a total of 138 miles. This involves a main and branch line haul, and terminal service involved in one stoppage in transit. The haul involved from Tucson to Phœnix is a main line and the branch of local line owned and controlled by the main line, and involves no stoppage in transit. The eighteen carloads were transported from Douglas to Tucson for a total of $400.00, or $2.80 per train mile, which includes general transportation of employees and agents.

On file with the Commission is the contract of the Arizona Eastern Railroad Company for transportation of Sells Floto Shows Company, from Maricopa to Phœnix, and returning from Phœnix to Maricopa, a total of 70 miles, involving two separate hauls. The charge
128 for this movement is $325.00 for 38 cars, including transportation of general agents and all employees, which is equivalent to 12.22¢ per car mile, which, applied to the eighteen cars of the Campbell Shows, would be equivalent to $2.20 per train mile. The Sells Floto Show carries a great many animals of considerable value, some of which, in case of loss or damage, the company would be responsible for to the extent of $500.00 each.

It is understood that the Campbell Shows do not carry many animals, and what are carried are of a comparatively low value. We have examined tariffs on file for movement of circuses and carnival outfits in Arizona, and we find among them tariff covering movement of the Campbell Shows on the Santa Fe Lines, about one year ago, the movement being from Phœnix to Prescott, Prescott to Clarkdale, Clarkdale to Needles, and Needles to Ludlow, which involves branch and main line hauls and several stops, at the rate of $3.00 per train mile, with the general concession of free transportation of agents and advance people.

Considering all the facts before us and rates made by other
129 carriers for the Campbell Shows this year, the rates made by these same respondent carriers for other shows and the rates generally provided for intrastate movements of this kind in the past, we are of the opinion that any rate in excess of $3.00 per mile for the transportation of the Campbell's United Shows, consisting of eighteen cars, employees and attendants, including the transportation of advance agents, to be excessive.

It is therefore ordered:

That the Southern Pacific Company and Arizona Eastern Railroad Company transport the cars, property, employees and attendants of Campbell's United Shows from Tucson, Arizona, via Maricopa, to Phœnix, Arizona, and to extend to the said Campbell's United Shows the usual privileges in the movement of advance agents, for a total amount not to exceed $3.00 per train mile for the entire service.

It is understood that the shipment will consist of not to exceed four coaches, four large box cars and ten flat cars, and it is further understood that the Southern Pacific Company and Arizona Eastern Railroad Company may enter into a contract covering this transportation, the terms of which shall not be in substantial
130 variance with the contract now existing between the Arizona Eastern Railroad Company and Sells Floto Shows Company, with respect to details as to responsibility, service and conditions, copy of said contract being on file with the Commission, and made on March 4, 1914, by and between the Arizona Eastern Railroad Company and Sells Floto Shows Company. It is further ordered that, upon submission of evidence that any charge or charges have been exacted by respondent companies for transportation of advance agents or employees, at variance with contract herein referred to, made by respondent, Arizona Eastern Railroad Company with Sells Floto Shows Company, that the amount or amounts so collected shall be refunded to Campbell's United Shows.

[SEAL.] ARIZONA CORPORATION COMMISSION.
W. P. GEARY, *Chairman;*

F. A. JONES,
Commissioners.

Dated at Phœnix, Arizona, this 25th day of March, 1914.

Attest:
FRANK DE SOUZA, *Secretary.*

131 Before the Arizona Corporation *Corporation*.

Docket No. 165.

In the Matter of Rate to be Charged Campbell's United Shows by Southern Pacific Company and Arizona Eastern Railroad Company for Transportation in Arizona.

Now comes the Southern Pacific Company, and having previously obtained permission from this Honorable Commission to file the hereinafter described authorities, files this its authorities in support of its contention that the Arizona Corporation Commission has no jurisdiction and is not vested with jurisdiction to prescribe rates for the movements of circuses and carnival shows:

1 Hutchinson on Carriers (Third Edition) Section 88.
Chicago, M. & St. P. R. Co. vs. Wallace, 66 Fed. 506.
Wilson vs. Atlantic Coast Line R. Co., 129 Fed. 774, affirmed in 133 Fed. 1022, Circuit Court of Appeals.
Coup vs. Wabash, St. L. & H. Ry., 56 Mich. 111, 22 N. W. 215.
Robertson vs. Old Colony R. R. Co., 156 Mass. 525, 31 N. E. 650, cited in B. & O. Ry. vs. Voigt, 176 U. S. 515.
Forepaugh vs. Delaware R. R. Co., 128 Penn. St. 217, 18 Atl. 503.
Cluff vs. Grand Trunk W. R. Co., 155 Fed. 81.
Moore on Carriers, Section 38, pages 79 and 80.
Cleveland, C. C. & St. L. Ry. Co. vs. Henry, 83 N. E. 710.

132 The Southern Pacific Company would also respectfully show to your Honorable Commission that the above authorities support the contention that a railroad that carries circuses and carnival shows is not acting as a common carrier when so doing.

Wherefore, the Southern Pacific Company, would respectfully show that your Honorable Commission has no jurisdiction over the above matter, and therefore, prays that no order be entered, directing the Southern Pacific Company to transport Campbell's United Shows over its line of railway from Tucson, Arizona, to Maricopa, Arizona, for three dollars per mile, or for any other sum.

FRANK COX,
Attorney for Southern Pacific Company.

Dated and filed March 25, 1914.

133 Before the Arizona Corporation Commission.

Docket No. 165.

In the Matter of Rate to be Charged Campbell's United Shows by Southern Pacific Company and Arizona Eastern Railroad Company for Transportation in Arizona.

Order.

To Southern Pacific Company, Tucson, Arizona; to Arizona Eastern Railroad Company, Tucson, Arizona:

You are hereby commanded to appear before the Arizona Corporation Commission at its office in the State House, Phoenix, Arizona, on or before 10:00 o'clock A. M., Monday, March 23, 1914, to show cause why this Commission should not issue Special Rate Authority as follows:

"Special Rate Authority No. —.

"In consideration of facts shown, the Southern Pacific Company and the Arizona Eastern Railroad Company are hereby ordered to publish on one day's notice the following rate for the transportation of Campbell's United Shows, consisting of eighteen (18) cars, and to furnish such equipment as may be necessary, within the State of Arizona:

134 "Tucson, Arizona, to Maricopa, Arizona, $3.00 per mile.

"Maricopa, Arizona, to Phoenix, Arizona, $3.00 per mile."

By Order of the Arizona Corporation Commission.

[SEAL.] FRANK DE SOUZA, *Secretary.*

Dated at Phoenix, Arizona, this 20th day of March, 1914.

Approved:

——— ———, *Chairman;*
A. W. COLE,
F. A. JONES,
Commissioners.

135 Endorsements.

Title of Tribunal and Cause—No. 165. Filed: Mar. 20, 1914. Frank De Souza, Secretary.

No. 7863. Plaintiff's Exhibit A. Filed: Dec. 9, 1915. James Miller, Jr., Clerk, by W. S. Wilson, Deputy.

No. 1529. In the Supreme Court State of Arizona. Filed: May 10, 1916. C. F. Leonard, Clerk Supreme Court.

136 PLAINTIFF'S EXHIBIT "B."

Before the Arizona Corporation Commission.

Docket No. 165.

In the Matter of Rate to Be Charged Campbell's United Shows by the Southern Pacific Company and Arizona Eastern Railroad Company for Transportation in Arizona.

Present: Commissioners, W. P. Geary, Chairman; F. A. Jones, Edgar A. Brown, Rate Expert.

Appearances:

V. O. Baker, E. W. Clapp and H. C. Hallmark, representing Southern Pacific Company and Arizona Eastern Railroad Company.
W. L. Williams, representing Campbell's United Shows.

Hearing March 23, 1914.

Reporter's Minutes.

Chairman Geary: Ready to proceed.
Mr. Jones: All right.
Mr. Brown: I don't think there have been any steps taken in this matter at all except Mr. Campbell through his representative, Mr. Williams, complained that the E. P. & S. W. had hauled him to Tucson and that the Southern Pacific and Arizona Eastern declined to haul him from Tucson to Phoenix for less than the tariff rates, although they were carrying rates for other shows. It was
137 on Mr. Williams' complaint that the hearing originated. Mr. Williams is here.
Mr. Williams: On or about February 14th, I called on Mr. McCann, at El Paso, representative of the Southern Pacific and asked for a rate and contract from El Paso over the Southern Pacific to Bowie and up to Miami and Globe and down to Cochise where the Southwestern would take me into Tucson and then from
138 Tucson to Maricopa. Mr. McCann said he would take it up and I waited two days and he said he could not get word; then I made my contracts through to Tucson and called on Mr. Hallmark and asked for a contract and he said he would take it up at once and I came over here (Phoenix) and spent two or three days and then went back to Tucson and Mr. Hallmark said he hadn't heard anything from San Francisco and a day or so later I went back again and he stated that the Sells-Floto had a thirty-day clause over me and that he could not move me. I went to Mr. Mustain, of the E. P. & S. W. and asked him if he ever heard of a thirty-day clause and what he thought about it and he called up Mr. Hallmark on the phone and Mr. Hallmark told him that that was an agreement of the western roads and that they could not move me; I went back to El Paso and then returned to Tucson and saw Mr. Hallmark and he said they had been notified not to make a contract as a common carrier with me, and I said what am I to do then, if you can show me any place to go I will do so, and he suggested Nogales. Well, Nogales is 60 miles down and it was impossible for me to go there and I said I will go to Ray, and he said, No, you will interfere with Floto's excursion rate, and I said, what can I do? and he said, I don't know, and I said I will complain to the Commission; I came up here and you wired Mr. Hallmark and he wired back that he would make a contract with me, but when I went back two days later, he said he could not make a contract; in the meantime I saw Mr. Booshee,

139 of Sells-Floto show, and asked him, will you release that clause; it is either that or I will have to close my show at Tucson, and Mr. Boosbee said, what to hell do you think I put that clause in for, and then I came out here and we looked over the tariff and found no thirty-day clause, and when I went to Mr. Hallmark, he said he would move me under the tariff which amounted to $90.00 a car, $1400, and then I would have to buy tickets for 100 or 110 people. I have my license here; have paid for it and got a receipt for it to show on the night of the thirtieth; I must come here; if not I must close in Tucson with all my people; that is the situation as it stands now. They have always made a contract with me before, except last year for some reason when I wanted to come to Phoenix they would not bring me in; they took me to Mesa and I lost money there and then they brought me here, but I have been after them six times since the 14th of February and have received no satisfaction.

Chairman Geary: How many cars have you?

Mr. Williams: I have eighteen; five of my own and I get eight flats from the company and four box cars.

Chairman Geary: What are you showing?

Mr. Williams: I have a carnival show.

Mr. Jones: What rate do you ordinarily get?

140 Mr. Williams: Over the Southwestern they gave me a rate for a special move of $3,50 and where they throw me into their regular service, that is, fill up my train with other cars, they charge me $3,00.

Mr. Jones: A mile?

Mr. Williams: Yes sir, for the outfit and men. And my rate last year with the Arizona Eastern; I haven't my Southern Pacific contract, but with the Arizona Eastern it was $185 to move my train from Tucson to Mesa and from Mesa here, which is about fifteen miles difference. This year Mr. Hallmark said he thought they could move us for $200 the same way because I had one extra car, and suggested that before he declined to give me a contract; from the Southern Pacific I have never had any word except they would not make a contract; they said they would wire San Francisco and see what they would do, but I have never had a satisfactory answer.

Mr. Jones: The reason they gave was they had to move another circus?

Mr. Williams: They never gave any reason except it interefered with Floto and in going to Ray I interferred with their excursion rate; Mr. Hallmark suggested that to me and also Mr. Boosbee.

Mr. Jones: You are in Tucson now?

141 Mr. Williams: I am there this morning and want to leave there on the twenty-ninth, next Sunday.

Mr. Brown: You had a contract with the Southwestern?

Mr. Williams: Yes sir.

Mr. Brown: Four hundred dollars for 138 mile movement?

Mr. Williams: I have a contract for 100 miles from Douglas to Bisbee and my contract from Bisbee to Tucson is 300 miles, carrying my people and all cars.

Mr. Brown: Two dollars and eighty cents for eighteen cars?

Mr. Williams: They furnish me what cars I want while on their line; the Santa Fe gave me about the same rate last year; I haven't asked them this year for a contract yet.

Mr. Baker: What do you have in your show, animals?

Mr. Williams: Small animals.

Mr. Baker: Mostly acrobats?

Mr. Williams: I have no acrobats at all; I have hand-balancing, have a merry-go-round, Ferris Wheel and Motordome,——

142 Chairman Geary: Have a bunch of freaks?

Mr. Williams: Yes.

Mr. Baker: How many side shows have you?

Mr. Williams: We don't class them as side shows; I don't get a license for side shows.

Mr. Brown: Does your El Paso & Southwestern contract include transportation for your advance agent and bill posters?

Mr. Williams: Yes sir, they issue me 20 per cent of my mileage for myself and agents, and I asked the Southern Pacific and Arizona Eastern, explained it to Mr. Hallmark that I wanted the contract signed so I could get my men out; as it is I have paid regular fare back and forth. Mr. Campbell has done the same and I asked Mr. Halimark if he would refund that and he said, No, he didn't think so. I have receipts for the fares I bought; I never had trouble with any other road except the Southern Pacific; I have traveled almost every road in the country and got the best service, but every time I get to Tucson I can not get over the Southern Pacific and Arizona Eastern without trouble.

Mr. Brown: Where do you propose to go from here?

Mr. Williams: From here to Prescott, Clarkdale and Kingman and from Kingman to Needles and then into California.

143 Mr. Brown: What rates have you on the Santa Fe?

Mr. Williams: I can not tell you yet; I have put in my application for a contract; I have a copy of my contract with them last year, which was very low, about the same as the Southwestern.

Mr. Brown: Your contract last year was to Prescott from here?

Mr. Williams: Yes sir.

Mr. Brown: And Prescott to Needles?

Mr. Williams: Yes sir.

Mr. Brown: They charged you about $3.00 per mile?

Mr. Williams: Yes sir.

Mr. Brown: Did they furnish you any additional cars?

Mr. Williams: All I asked for and mileage.

Mr. Jones: That is passenger transportation?

Mr. Williams: Yes, that is to get the agents over the road,

144 myself and bill poster, advertising men.

Mr. Baker: How many people in your show?

Mr. Williams: About 100.

Mr. Jones: The correspondence we had with the traffic people with the railroads indicated that they took the position that they were not common carriers for a circus, is that the position of the Southern Pacific?

Mr. Baker: Yes sir; we wish to take the position we are not common carriers for circuses and carnivals; we want that in the record.

Mr. Jones: Have you anything to offer in support of that position?

Mr. Baker: I might say this: The notice was so short, I telegraphed to San Francisco Saturday, but we haven't had time to get down any data on that point; should the Commission think it necessary to file the same, we will do so.

Chairman Geary: What is this special rate authority based on?

Mr. Brown: The proposed rate authority is based upon the contracts that have been made heretofore and the present contract over the El Paso & Southwestern and last year's contract with the Southern Pacific and Arizona Eastern.

145 Mr. Jones: Have you last year's Southern Pacific and Arizona Eastern contract?

Mr. Brown: No sir, I have neither of them.

Mr. Jones: What did you pay last year?

Mr. Williams: One hundred eighty-five dollars, paid $115.00 to Mesa and $75.00 from Mesa here.

Mr. Jones: Same number of people and cars?

Mr. Williams: Yes sir.

Mr. Jones: What is the objection, Mr. Clapp, to making the same rate you did last year?

Mr. Clapp: Well, the Southern Pacific has not stated except that they proposed to keep these carnival shows spaced; the understanding, as I understand it, is that they are to keep them thirty days apart.

Mr. Jones: Think you can refuse transportation to any one that applies for it under the regular and customary charges for that reason?

Mr. Clapp: If he wants to move he should be willing to pay the tariff; we don't want to contract with him on a special basis; we haven't declined to move him on the tariff.

146 Mr. Jones: The position of the railroad is they will move them at the special rate if they will move at a time that is convenient to the carrier?

Mr. Clapp: Yes sir.

Mr. Jones: But if they move at the convenience of the shipper they will have to move at another rate?

Mr. Baker: I am not acquainted with this special thirty-day contract, but I understand there is an agreement between all show people as well as the railroads to keep the shows spaced. This show coming in before Sells-Floto and with which the company has a contract, if he tenders the money, the freight at the regular rates we have to carry him.

Mr. Jones: If the regular rate is reasonable; if it is not reasonable you will have to carry him any way under the law.

Mr. Baker: Possibly so.

Mr. Jones: I would like to hear the justification of the carriers saying arbitrarily they will carry him at one rate one time and under another rate the next time.

Mr. Baker: We want to make a matter of record the question

of jurisdiction; we are not intrastate carriers for circuses and for that reason we hardly think the Commission would have jurisdiction to order a rate.

147 Mr. Williams: I have asked for any place where I could show; I never knew of any thirty-day clause with any circus and I have had a good deal of experience, outside of Sells-Floto. I said show me a route I can take and I will take it, but I don't want to go to any extra expense; they won't haul me to Ray; that interferes with their excursion rates.

Mr. Jones: I don't think the show people need let the railroads dictate to them where they should show.

Mr. Hallmark: We are not carrying Sells-Floto as a common carrier; we are carrying them as a private carrier under a separate contract all together.

Mr. Jones: I would like to have the railroad show me wherein under the law they can assume the position of private carrier at any time with charges for transportation. If the carriers can show a justification for it or reason for it we will discuss it; it is another question. Have you looked it up?

Mr. Baker: I haven't gone into that matter, we just got the notice Saturday and telegraphed San Francisco office and they have gone into the matter a little and that is the result of their investigation; they telegraphed me, but didn't quote a decision; I haven't had time to go into the decisions.

Mr. Jones: I can not read the statute that way; I read the
148 statute that a railroad operating as a common carrier of all sorts of traffic, the rates must be just and equitable and reasonable as between people needing transportation.

Mr. Baker: That is as a common carrier, but with the Sells-Floto we have a contract and act as a private carrier.

Mr. Jones: If you can become a private carrier of a show, you can become a private carrier of cattle; both are property.

Mr. Baker: It is a question of the kind of property; we can not haul elephants and giraffes; if anybody handed us an elephant or a giraffe we should not be compelled to carry it; if they tender us horses we are compelled to take them.

Mr. Williams: I suggested that if they had a freight they could take us that way, put my cars in the regular freight and move us that way.

Mr. Jones: The reason I asked that question was to obtain the position of the carrier, how they arrive at the belief that they can become a private carrier when they want to.

Mr. Baker: I have no data to file at this time on that matter. We would be glad if we had a little more time to get the data here; I didn't know that the question would arise; in fact I am not well acquainted with the Floto contract.

149 Mr. Fisher: It has always been the policy of Booshee to have a contract where he can make it stick; by mere force they can do so, but it has not been shown that it ever stuck where it was brought up for hearing.

Mr. Hallmark: Mr. Campbell always insisted on a thirty-day clause.

Mr. Williams: Mr. Campbell never asked for it; I never asked for it or anybody else asked for it; I could have had a thirty-day clause from the Southwestern, but I never asked for it.

Mr. Hallmark: This is the first time I ever had it up with you, but Mr. Campbell has; your former advance agent asked for it.

Mr. Williams: I was never instructed by Mr. Campbell or was anybody else instructed by Mr. Campbell to ask for any kind of clause.

Mr. Jones: I have no blame for the circus if it can get it.

Mr. Clapp: He is trying to make capital out of it now; their advance agent a year ago asked for it and Mr. Campbell asked for it; he is not stating that of his own knowledge; he is not under oath.

Mr. Campbell (?): I asked Mr. Campbell and he said No, and his word to me is good.

150 Mr. Jones: You have no elephants or giraffes?

Mr. Williams: No.

Mr. Jones: I can see where a circus handling an elephant or giraffe or something of that kind might make a contract for a reasonable rate per train mile and on account of the hazardous situation make a contract releasing the carrier from liability, to that extent, but the carrier would still be a common carrier the same as the railroad now takes a contract releasing it from liability for cattle or horses at so much a head, but I can not see where any justification can be presented under the law or in equity allowing them to decline at one time to carry a shipment and another time carry it or prescribing a different rate.

Mr. Clapp: Understand we haven't declined to handle this carnival on the basis of Class A minimum 20,000 pounds as we would move any side show or kindred show.

Mr. Jones: Then the question comes up, what is a reasonable rate for that movement, what rate are you making for movements of that kind?

Mr. Clapp: Class A rate, minimum 20,000 pounds.

Mr. Jones: Are you making that to other circuses?

151 Mr. Clapp: No sir.

Mr. Hallmark: We are handling them as a common carrier; where they are handled as a common carrier moving in regular train service that is the rate.

Mr. Jones: Why is this rate justified in the face of a rate a few days ago materially less or why is the carrier justified in prescribing a rate higher than the rate prescribed last year for the same movement; why should the rate be three or four times higher than it was last year for practically the same movement?

Mr. Clapp: I do not know.

Mr. Hallmark: Transporting a show or carnival in special service involves considerable disarrangement of the schedule; involves a great deal of special work in the way of transportation of the special men; transportation at an unusual time; when it can be arranged to transport them on that basis the contract is made. When a man

comes to us and wants to move his show at a certain time or move it when it is not convenient for us to enter into a contract as a private carrier he has the privilege of being transported at the published rate.

Mr. Jones: It is a question as to the reasonableness of the rate; what I would like to hear is a justification of the rate the first time of approximately $200 for two movements in thirty days and a rate of $1,200 to $1,400 the next time; the same disarrangement;
152 the same operating conditions would prevail; if they prevail now they prevailed a year ago and you handled it?

Mr. Hallmark: No sir, last year there was no show on the line.

Mr. Jones: A road like the Southern Pacific would not be embarrassed by a movement of eighteen or twenty cars?

Mr. Hallmark: Might be.

Mr. Baker: We might have to run a special train.

Mr. Jones: The gentleman said he offered to be handled on the regular train.

Mr. Clapp: The Southern Pacific does not handle passengers on freight trains.

Mr. Jones: How did you handle it last year?

Mr. Hallmark: Handled them last year by a special train movement.

Mr. Jones: That is the point to be cleared up, why the difference in the rate under the same operating conditions?

Chairman Geary: Any other testimony?

Mr. Baker: I don't believe we have any.

153 Chairman Geary: Is that all, Mr. Williams.

Mr. Williams: That is all.

Mr. Jones: Do you wish to file briefs?

Mr. Baker: We would like for the record to show that if we desire to file anything additional we may do so. We haven't heard anything from San Francisco except that one telegram.

Mr. Jones: It does not seem to me your attorneys will seriously contend you are not common carriers at all times under all conditions.

Mr. Baker: They take this position; they are not common carriers of circuses.

Mr. Clapp: The Interstate Commerce Commission has recognized that; they saw the wisdom of recognizing the difference.

Mr. Jones: For the reason stated a while ago, for purpose of making a contract releasing you from extra liability.

Mr. Clapp: Do you consider Class A prohibitive?

Mr. Jones: Three dollars a mile was a reasonable rate on the El Paso & Southwestern and $3.00 a mile was reasonable on the Southern Pacific last year; I would say without question that
154 Class A is unreasonable.

Mr. Hallmark: I don't think you will find that the Southern Pacific transported them last year for $3.00 a mile.

Mr. Clapp: They haven't shown it.

Mr. Jones: I will qualify that by saying "if that is true." We

understand that last year you handled the movement for something like $200; that hasn't been denied, has it?

Mr. Clapp: I haven't the papers or anything with me; I can not deny or affirm it; do you remember?

Mr. Hallmark: If it was around $200, it was $4.00 a mile.

Mr. Jones: You went to Mesa last year and that would be two services, two separate movements.

Mr. Hallmark: That is pretty low, even at $4.00.

Mr. Clapp: As I recall it, there were two separate movements, one to Mesa and the other into here.

Mr. Jones: You think $3.00 a train mile for movement of this kind is too low a rate?

Mr. Hallmark: Where you have to do double service with
155 your locomotive; you have to do the switching, the loading and unloading, disarranging your regular service, yes; it might be fair where you are hauling a big circus and get a big excursion business, but it is very low for the movement where there is nothing but the carnival to move.

Mr. Brown: When do you want to open here?

Mr. Williams: I have a license to start the

Mr. Williams: I have a license to start the night of the thirtieth.

Mr. Jones: When do you want to move?

Mr. Williams: From 7 o'clock in the morning to 12 o'clock at night, the twenty-ninth.

I, J. M. Phillipowski, Official Reporter of the Arizona Corporation Commission, do hereby certify the above and foregoing is a true and correct transcript of my shorthand notes taken at the hearing in the above entitled cause and that said transcript is a true and correct transcript of the evidence submitted therein to the best of my ability.

(Signed) J. M. PHILLIPOWSKI,
Official Reporter Arizona
Corporation Commission.

Filed April 7, 1914. J. M. Phillipowski, Official Reporter.

156 Endorsements.

Filed April 7, 1914. J .M. Phillipowski, Official Reporter.

No. 7863. Plaintiff's Exhibit B. Filed Dec. 9, 1915. James Miller, Jr., Clerk, by W. S. Wilson, Deputy.

No. 1529. In the Supreme Court, State of Arizona. Filed May 10, 1916. C. F. Leonard, Clerk Supreme Court.

(Here follow fac-simile tariffs, marked pages 157 to 174.)

Only one supplement to this tariff may be in effect at any time.

I. C. C. No.132
A. C. C. No. 19
CANCELS I. C. C. No. 16 and 124

DEFENDANT'S EXHIBIT NO. 1.

Arizona Eastern Railroad Company

Local and Joint Passenger Tariff

OF

First-Class Round-Trip Individual Fares, Week End Fares, Party Fares, Side Trip Fares and Commutation Fares

AND

Rates for Movement of Baggage Cars of Theatrical and Other Parties and

Rates for Movement of Baggage Cars of Theatrical and Other Parties and for Private Passenger Cars

AND

Fares for Movement of Parties by Special Train

BETWEEN STATIONS

Shown Herein

PARTICIPATING CARRIERS

Galveston, Harrisburg and San Antonio Railway Co., PX3 No. 505

Southern Pacific Company (Pacific System), PX3 No. 375

ISSUED JULY 24, 1912 **EFFECTIVE AUGUST 30, 1912**

ENDORSEMENT:

Defendant's Exhibit No. 1
Filed Dec. 9, 1915
James Miller, Jr., Clerk -- By W. S. Wilson, Deputy.

Issued by
E. W. CLAPP,
General Passenger Agent,
TUCSON, ARIZONA

157

Issued by
E. W. CLAPP,
General Passenger Agent,
TUCSON, ARIZONA

160

Supplement No. 2
(Cancels Supplement No. 1.) To
I. C. C. No. 132
A. C. C. No. 19

Arizona Eastern Railroad Company

Supplement No. 2

(Cancels Supplement No. 1.)

To

Local and Joint Passenger Tariff

Participating Carriers are as shown in the Tariff to which this is a Supplemeut

Substitute the following for Paragraphs 1 and 3, of Section 8

† For movement by regular train of a private passenger car (parlor car, sleeping car, excursion, photographic exhibit car, or combination baggage and sleeping car) with party desiring the exclusive use thereof, the charge will be the regular authorized fare for each occupant with a minimum of twenty (20) authorized adult tickets or the equivalent thereof for distance traveled by car for each car so furnished. For each movement in tourist, second class or immigrant cars, second class tickets sold at second class colonist or immigrant fares, if in effect, will be accepted. In counting number of tickets two children paying half fare will be counted as equivalent to one adult.

♦* Tickets held by occupants of Special Cars will be good for passage only in Special Cars. Passengers will not be priviledged to occupy space in other cars except the smoking or dining car of the train. Members of parties occupying regular equipment will be charged the regular authorized fare but must not be considered part of the minimum of (20) Twenty persons in computing the charge for moving the Special Car.

♦ Advance
† Effective December 12, 1913, in Supplement No. 1.
* Effective with This Supplement.

Issued January 26, 1914 **Effective March 2, 1914**

Issued by
E. W. CLAPP,
General Passenger Agent,
TUCSON, ARIZONA

Section 6. Week End Fares to Hot Springs and Geronimo:

FROM	TO	Rate with Stage Service out of which Stage Co. receives $1.00.	Rate without Stage Service
Globe .....Ariz.	Indian Hot Springs, Ariz., and return.	$5.40	$4.40
Safford .....Ariz.		2.25	1.25
Solomon .....Ariz.		2.55	1.55
Thatcher .....Ariz.		2.15	1.15
FROM	**TO**	**Rate**	
Globe .....Ariz.	Geronimo, Arizona, and return.	$3.90	

(1) SALE DATES: Saturday and Sunday of each week.

(2) LIMIT: Monday following date of sale.

(3) STOPOVERS: Will not be allowed.

(4) CHILDREN: A child under (5) five years of age will be carried free when accompanied by parent or guardian. A child (5) five years or over and under (12) twelve years will be charged half of the adult fare.

Agents must not sell one whole ticket for two children. Furnish each child with a separate ticket.

(5) BAGGAGE: Will be carried in accordance with the rules and charges stated in Local Interdivision and Joint Tariff No. 1, I. C. C. No. 2, issued by A. T. Lewis, Agent, supplements thereto and reissues thereof.

Note—The Stage Company makes no charge for excess baggage between Springs Station and the Springs.

(6) VALIDATION: Tickets must be validated before they will be accepted for return passage. Mr. R. Wrightman will validate tickets destined to Geronimo, and Mr. A. C. Alexander, manager of the Springs Hotel, will validate tickets destined to the Springs.

Section 7. Rates for Movement of Special Baggage Cars:

(1) For a party paying not less than twenty-five (25) adult fares or their equivalent, one special baggage car containing personal baggage and show paraphernalia may be carried free of charge, provided the 25 fares aggregate $10.00 or more for each movement.

Example: A party purchases 25 adult tickets at Safford for Thatcher for $3.75 and desires to have a baggage car moved. The additional charge therefor will be $6.25, or enough to yield $10.00 for the movement.

The same principle would govern where a party purchased 25 adult tickets at Safford for Globe and desired the baggage car moved to Thatcher.

(2) For each additional twenty-five (25) fares an additional baggage car may be moved without charge, under substantially the same conditions as stated in Paragraph 1.

(3) Parties of less than twenty-five (25) persons may secure a special baggage car by paying twenty-five (25) adult fares or their equivalent for the distance carried. Subject to the requirements stated in Paragraph 1.

(4) The tickets of recognized advance agents, not exceeding four (4) in number will be counted in the number of fares required in order to secure free movement of a baggage car.

(5) When a special baggage car is furnished to a party paying twenty-five (25) adult fares or their equivalent, none of the baggage belonging to the party will be carried in the regular baggage cars, except the baggage of the advance agents. Not to exceed 150 pounds each may be carried in regular cars in advance of the party.

Section 8. Rates for Movement of Special Passenger Cars:

(1) For movement by regular train of a private passenger car (parlor car, sleeping car, excursion, photographic or exhibit car) with party desiring the exclusive use thereof, the charge will be the regular authorized fare for each occupant with a minimum of eighteen (18) full authorized adult tickets or the equivalent thereof for distance traveled by car. For each movement in tourist, second class or immigrant cars, second class tickets sold at second class colonist or immigrant fares, if in effect, will be accepted.

(2) Employes of chartered or private cars necessary to the operation of such cars in the capacity of conductors, cooks, waiters and porters and who are not private servants, will be regarded as train employes and carried free.

(3) Tickets held by occupants of special cars will be good only for passage in special car. Passengers will not be privileged to occupy space in other cars except the smoking or dining car of the train.

Members of parties occupying regular equipment will be charged the regular authorized fare, but must not be considered part of the minimum of eighteen (18) in computing the charge for movement of the special car.

(4) All private cars must pass usual Operating Department inspection and will be handled upon the understanding we make repairs which in our opinion are necessary for safety, our bill will be paid promptly. No mileage will be paid on any cars privately owned.

(5) All arrangements for handling special or private cars under this tariff should be made through the General Passenger Office whenever practicable.

It is not always possible to handle extra or special passenger cars and this company will in no case guarantee their handling. Such cars will be handled on such trains as best suits the Operating Department's convenience. When possible complete advice of the movement of special passenger cars will be given to all interested by the General Passenger Office.

C. R. C. No. 1003.
Cancelling C. R. C. Nos. 768 and 835.

A. R. C. No. 131.
(Cancelling A.R.C. Nos. 4 and 91.)
N. R. C. No. 141.
(Cancelling N. R. C. Nos. 112 and 122.)
O. R. C. No. 63-A
Cancelling O.R.C. Nos. 36-A and 47-A.

SOUTHERN PACIFIC COMPANY
(PACIFIC SYSTEM)

GENERAL PASSENGER DEPARTMENT

J. R. G.
MAR 4 1911

CIRCULAR No. 2191.
(Cancelling Circulars Nos. 1647, 2004 and 2060.)

LOCAL, INTER-DIVISION AND JOINT TARIFF

—COVERING—

Rates for Special Trains,

Special Cars, Private Cars and Baggage Cars

BETWEEN LOCAL POINTS

—AND—

BETWEEN LOCAL POINTS AND EL PASO, TEX.,

—AND—

FOR BAGGAGE CARS

—FROM—

SAN FRANCISCO, CAL., LOS ANGELES, CAL., AND PORTLAND, ORE.,

—TO—

Atchison ..... Kan.	Galveston ..... Tex.	Omaha ..... Neb.
Chicago ..... Ill.	Houston ..... Tex.	Pueblo ..... Colo.
Colorado Springs ..... Colo.	Kansas City ..... Mo.	Salt Lake City ..... Utah
Council Bluffs ..... Ia.	Leavenworth ..... Kan.	San Antonio ..... Tex.
Dallas ..... Tex.	Memphis ..... Tenn.	Sioux City ..... Ia.
Denver ..... Colo.	Mineola ..... Tex.	St. Joseph ..... Mo.
Duluth ..... Minn.	Minneapolis ..... Minn.	St. Louis ..... Mo.
Ft. Worth ..... Tex.	New Orleans ..... La.	St. Paul ..... Minn.

EFFECTIVE APRIL 1, 1912.

JOHN M. SCOTT,
General Passenger Agent,
Portland, Ore.

F. E. BATTURS
General Passenger Agent,
Los Angeles, Cal.

Issued by
CHAS. S. FEE,
Passenger Traffic Manager.

JAS. HORSBURGH, Jr.,
General Passenger Agent,
San Francisco, Cal.

ISSUED SAN FRANCISCO, CAL., FEBRUARY 23, 1912.

(12-22-11—2500.) File Baggage Cars R366, Special Cars R 367, Special Trains R 563.

SECTION 3. STATIONS FROM AND TO WHICH THIS TARIFF APPLIES.

Station From Which This Tariff Applies.

1. From all stations on lines of Southern Pacific Co. (Pacific System) including El Paso, Texas. For alphabetical list of such stations, see I. C. C. No. 2042 and C. R. C. No. 971 supplements thereto or reissues thereof.

SECTION 4.

Station To Which This Tariff Applies.

2. To all stations on lines of Southern Pacific Co. (Pacific System) including El Paso, Texas, and to all points on the Sunset Railroad. For alphabetical list of such stations, see I. C. C. No. 2042 and C. R. C. No. 971, supplements thereto or reissues thereof.

Also to the following points:
El Portal, Cal.
Phoenix, Ariz.
Salt Lake City, Utah.

SECTION 5. PASSENGER TARIFFS IN WHICH FARES APPEAR THAT ARE TO BE USED AS PER BASIS OUTLINED IN THIS TARIFF.

A complete list of current Southern Pacific Co.'s lawful One-Way Tariffs on file with the Interstate Commerce Commission and the Railroad Commission of California appears in the List of Tariffs and Circulars, I. C. C. No. 2042, C. R. C. No. 971, supplements thereto and reissues thereof. For convenience a detailed list of such tariffs is shown below:

Coast Division.—Local Passenger Tariff No. 46, I. C. C. No. 2036, C. R. C. No. 961.—Inter-Division Tariff No. 15, I. C. C. No. 2012, C. R. C. No. 924.

Los Angeles Division.—Local Passenger Tariff No. 37, I. C. C. No. 1809, C. R. C. No. 532.—Inter-Division Tariff No. 17, I. C. C. No. 2025, C. R. C. No. 941.

Lines in Oregon Local Passenger Tariff No. 43.—I. C. C. No. 1894.—Inter-Division Tariff No. 4, I. C. C. No. 1216.

Oregon Eastern Branch from Klamath Falls.—Local Passenger Tariff No. 44, I. C. C. No. 1956.

Nevada and California Local Passenger Tariff No. 2, I. C. C. No. 15[illegible], C. R. C. No. 29.

Nevada and California Branch from Mojave, Local Passenger Tariff No 39, I. C. C. No. 1828, C. R. C. No. 601.

Sacramento and Shasta Divisions.—Local Passenger Tariff No. 27, I. C. C. No. 1753, C. R. C. No. 397.—Inter-Division Tariff No. 18, I. C. C. No. 2033, C. R. C. No. 955.

Sacramento Southern Branch, I. C. C. No. 1772, C. R. C. No. 464.

Salt Lake Division.—Local Passenger Tariff No. 8, I. C. C. No. 1556.—Inter-Division Tariff No. 19, I. C. C. No. 2035, C. R. C. No. 959.

San Joaquin Division.—Local Passenger Tariff No. 33, I. C. C. No. 1799, C. R. C. No. 510.—Inter-Division Tariff No. 12, I. C. C. No. 1474, C. R. C. No. 48.

Tucson Division.—Local Passenger Tariff No. 38, I. C. C. No. 1850.—Inter-Division Tariff No. 5, I. C. C. No. 1263.

Western Division.—Benicia Route Local Passenger Tariff No. 29, I. C. C. No. 1777, C. R. C. No. 471.
Martinez and Niles Route Local Passenger Tariff No. 34, I. C. C. No. 1802, C. R. C. No. 512.
Inter-Division Tariff No. 11, I. C. C. No. 1473, C. R. C. No. 47; also No. 16, I. C. C. No. 2013.

Sacramento River Steamers.—Local Passenger Tariff No. 36, I. C. C. No. 1814, C. R. C. No. 535.

Joint Passenger Tariff No. 24, I. C. C. No. 2010, C. R. C. No. 922 for bases to interline points.

Rio Grande Joint Passenger Tariff No. 127, Nat. A. Black's, I. C. C. No. 38, for fares to interline points.

Oregon Joint Passenger Tariff No. 9, I. C. C. No. 1880, for fares to interline points.

Dumbarton and Centerville Branch.—Local Passenger Tariff No. 18, I. C. C. No. 2040, C. R. C. No. 968.

SECTION 6. RULES AND REGULATIONS GOVERNING THIS TARIFF.

1. The rates and arrangements shown herein are for parties or persons desiring special service and accommodations as outlined. Where the proper handling of our business requires, extra trains will be run or extra equipment added to regular trains, as such conditions may demand. The parties to this Tariff do not obligate themselves to handle or furnish extra equipment on any specific day, or at any specific point, or on any specific train, when it is impracticable.

Employes.

2. Employes of chartered or private cars necessary to the operation of such cars in the capacity of conductors, cooks, waiters and porters and who are not private servants, will be regarded as train employes and carried free.

Occupants of Car.

3. Tickets held by occupants of special cars will be good only for passage in special car. Passengers will not be privileged to occupy space in other cars except the smoking or dining car of the train.

Members of parties occupying regular equipment will be charged the regular authorized fare, but must not be considered part of the minimum of eighteen (18) in computing the charge for movement of the special car.

Baggage Over Carload Allowance.

4. : All baggage in excess of carload allowance (i. e., the capacity of 70-foot clear car) must be paid for at regular excess baggage rates. If less than a 70-foot car is furnished, overflow baggage within the carload allowance will be handled in regular baggage car without charge.

Passengers in Baggage Cars.

5. Passengers will not be allowed to ride in special baggage cars except by special authority of the Passenger Traffic Manager, the General Baggage Agent or General Passenger Agent.

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: Decrease

SECTION 7.

JOINT, INTER-DIVISION AND LOCAL RATES FOR MOVEMENT OF PRIVATE PASSENGER CARS IN REGULAR AND SPECIAL TRAIN SERVICE BETWEEN POINTS ON SOUTHERN PACIFIC, INCLUDING EL PASO, TEX., AND TO EL PORTAL, CAL., AND POINTS ON SUNSET R. R.

Rates.

1. For movement by regular train of a private passenger car (parlor car, sleeping car, excursion, photographic exhibit car, or combination baggage and sleeping car) with party desiring the exclusive use thereof, the charge will be the regular authorized fare for each occupant with a minimum of eighteen (18) authorized adult tickets or the equivalent thereof for distance traveled by car for each car so furnished. For each movement in tourist, second class or immigrant cars, second class tickets sold at second class colonist or immigrant fares, if in effect, will be accepted. In counting number of tickets two children paying half fare will be counted as equivalent to one adult.

Minimum Collection for Each Movement.

2. The minimum collection for each movement will be $15.00. (See paragraph 9, Section 8.)

Exception.—Special cars named in this section handled on the going trip via Union Pacific R. R., via Denver & Rio Grande R. R., via San Pedro, Los Angeles and Salt Lake R. R., via El Paso and Southwestern R. R., via Galveston, Harrisburg & San Antonio Ry. and via Oregon-Washington Railway and Navigation Company, via Western Pacific Ry., provided occupants hold not less than eighteen (18) full adult tickets on the going trip from point car was turned over to the Southern Pacific Co. may be returned to such point via same route as used on the going trip for any number of tickets, minimum requirement of eighteen (18) tickets being waived.

SECTION 8.

JOINT, INTER-DIVISION AND LOCAL RATES FOR MOVEMENT OF BAGGAGE CARS IN REGULAR AND SPECIAL TRAIN SERVICE BETWEEN POINTS ON SOUTHERN PACIFIC, INCLUDING EL PASO, TEX., AND TO POINTS ON SUNSET R. R.

Rates (Parties Less than 25).

1. For movement by regular train of a private or extra baggage car with party of less than twenty-five (25) passengers desiring the exclusive use thereof, the charge will be the regular authorized fare for each member of the party and in addition ten times the one-way first-class adult passenger fare for route traveled by car (see footnote), except that if this basis yields more than $235 between San Francisco and El Paso or intermediate points, or between Los Angeles and Ogden or intermediate points, in which event $235 will apply.

Minimum Collection for Each Movement.

2. The minimum collection for each movement will be $15.00. (See paragraph 9, this section.)

Rates (Parties of 25 or more).

3. For movement by regular train of a private or extra baggage car with party of no less than twenty-five (25) adults or their equivalent desiring the exclusive use thereof, the charge will be the regular authorized fare for each member of the party for distance traveled by car. In counting number of tickets, two children paying half fare will be counted as equivalent to one adult. (See footnote.)

Minimum Collection for Each Movement.

4. The minimum collection for each movement will be $25.00. (See paragraph 9, this section.)

5. For each additional twenty-five (25) fares an additional baggage car may be moved without charge provided the revenue from the party requiring two baggage cars shall not be less than $40.00 per movement; for party requiring three baggage cars, $55.00 per movement.

6. When party occupies a special car, the minimum charge for any movement with a special baggage car will be as follows:

1 special passenger car, 1 special baggage car	$25.00	25 tickets
1 special passenger car, 2 special baggage cars	40.00	50 "
1 special passenger car, 3 special baggage cars	55.00	75 "
2 special passenger cars, 1 special baggage car	50.00	36 "
2 special passenger cars, 2 special baggage cars	50.00	50 "
2 special passenger cars, 3 special baggage cars	65.00	75 "

As a matter of convenience the number of tickets for which parties may move both passenger and baggage cars without charge as per preceding rules in this Tariff are also shown.

7. The tickets of recognized advance agents, not exceeding four in number, of a theatrical, operatic or concert company or other party, will be counted in the number of fares required in determining collection for movement of baggage cars as per above paragraphs.

8. When baggage car is furnished without additional charge account party of twenty-five, no baggage will be checked or transported on twenty-one of the individual tickets held by persons making up the twenty-five.

9. If stop-overs are made, the journey from each point of stop-over will not be considered as a separate movement, provided party has through tickets. Where side-trip is made, for example, Goshen Junction to Hanford and return or where a round-trip is made, only one minimum will be collected. No minimum will be collected where the total collection for the round trip or side trip is in excess of the minimums specified. No charge will be made for side-trip movement when parties hold tickets that carry privilege of side trip without extra charge as per side trip and stop-over Tariff Circular No. 2104 I. C. C. No. 1996, C. R. C. No. 897, supplements thereto or reissues thereof.

NOTE.—A party of twenty-five (25) or more requiring two or more baggage cars, have the option of paying for the additional car or cars under arrangements in Rule 1, or under the arrangement in Rule 3, as the case may be. A party of less than twenty-five (25) may buy additional tickets to equal 25.

SECTION 9—Concluded.

JOINT RATES FOR MOVEMENT OF BAGGAGE CARS FROM SAN FRANCISCO, LOS ANGELES AND PORTLAND TO CERTAIN DESTINATIONS ON OTHER LINES—Concluded.

TO	ROUTE	— Rates From— San Francisco	Los Angeles	Portland
Omaha, Neb.	Use same rates as shown for Council Bluffs, Iowa, via same routes	.....	.....	.....
Pueblo, Colo.	Use same rates as shown for Denver, Colo., via same routes	.....	.....	.....
San Antonio, Tex.	Via El Paso	$350.00	$ 350.00	$450.00
" "	Via S. P. Co. Ogden or ¶W. P. Ry. and Denver, Colorado Springs or Pueblo	350.00	.....	.....
San Diego, Cal.	Via S. P. Co. to Los Angeles and A. T. & S. F. Ry.	170.00	.....	347.00
San Diego, Cal.	(From Ogden via S. P. Co. to San Francisco or Stockton or Los Angeles, thence A. T. & S. F. Ry., :$265.00.) (From Portland via S. P. Co. to San Francisco or Stockton, thence A. T. & S. F. Ry., :$347.00.)			
St. Joseph, Mo.	Via S. P. C. Ogden or ¶W. P. Ry. Salt Lake City and Cheyenne or Grand Junction (direct or through Omaha, Council Bluffs, Pacific Junction, Atchison or Kansas City)	350.00	350.00	574.00
" "	Via El Paso and Albuquerque, Dalhart, Fort Worth or San Antonio	350.00	350.00	574.00
" "	Via Los Angeles and Salt Lake City or Albuquerque (direct or through Omaha, Council Bluffs, Pacific Junction, Atchison or Kansas City)	350.00	*350.00	574.00
" "	Via San Francisco, Stockton or Bakersfield, thence A. T. & S. F. Ry.	350.00	.....	574.00
" "	Via Portland and Huntington or Billings	435.00	435.00	*350.00
" "	Via Portland, Seattle, Spokane and Huntington	435.00	435.00	.....
St. Louis, Mo.	Via Council Bluffs or Atchison or Leavenworth or St. Joseph or Pacific Junction or Kansas City	:418.75	:418.75	.....
" "	Via El Paso and Fort Worth, Dallas, San Antonio or Texarkana	418.75	418.75	.....
" "	Via Portland and Huntington or Billings	:503.75	:503.75	*418.75
" "	Via El Paso and New Orleans	425.00	425.00	.....
" "	Via Portland, Seattle, Spokane and Huntington	:503.75	:503.75	.....
St. Paul, Minn.	Via Kansas City or Council Bluffs or Sioux City (direct or via Sabula or Savanna)	435.00	435.00	.....
" "	Via Portland and Sumas or Seattle	435.00	435.00	*350.00
" "	Via Portland, O.-W. R. R. & N. Co. to Spokane and Kingsgate	435.00	435.00	*350.00
" "	Via Portland, O.-W. R. R. & N. Co. or S. P. & S. Ry. to Spokane, and G. N. Ry. or N. P. Ry.	435.00	435.00	*350.00
" "	Via Portland and N. P. Ry. or G. N. Ry.	435.00	435.00	*350.00
" "	Via Portland, O.-W. R. R. & N. Co., Seattle and G. N. Ry. or N. P. Ry. or C. M. & P. S. Ry.	435.00	435.00	*350.00
" "	Via Portland, N. P. Ry., Seattle, G. N. Ry. or C. M. & P. S. Ry.	435.00	435.00	.....
" "	Via Portland, G. N. Ry., Seattle, C. M. & P. S. Ry.	435.00	435.00	.....
" "	Via Portland, Huntington and Council Bluffs, direct	435.00	435.00	*350.00
" "	Via Portland, Seattle, Spokane and Huntington	435.00	435.00	.....
[redacted]e City, Utah	Via S. P. Co. to Ogden and O. S. L. R. R. or D. & R. G. R. R.	:235.00	:235.00	.....
" " "	Via S. P. Co. to San Francisco, Stockton, Sacramento and Marysville and Western Pacific Ry.	.....	:235.00	.....

SECTION 10.

JOINT, INTER-DIVISION AND LOCAL RATES FOR MOVEMENT OF PARTIES ON SPECIAL TRAINS BETWEEN POINTS ON SOUTHERN PACIFIC, INCLUDING EL PASO, TEX., PHOENIX, ARIZ., AND TO EL PORTAL, CAL., AND TO POINTS ON SUNSET R. R.

Rates.

1. When power and equipment are available and suitable schedules can be arranged, special trains may be run for the exclusive use of a party and the charge will be the regular authorized fare for each occupant, with a minimum of one hundred and twenty-five (125) authorized adult tickets (two children paying half fare will be counted as one adult) for distance traveled by train, except as follows:

Where circumstances will permit, special trains will be run for seventy-five (75) or more first-class adult tickets sold at Winnipeg, Man.; Duluth, Minn.; Minneapolis, Minn.; St. Paul, Minn.; Sioux City, [illegible]; Council Bluffs, Ia.; Omaha, Neb.; Pacific Junction, Ia.; Atchison, Kans.; Leavenworth, Kan.; St. Joseph, Mo.; Kansas City, Mo.; Ft. Worth, Tex.; San Antonio, Tex., or points east thereof to points in California, Nevada, Utah, Oregon, Washington, Arizona or New Mexico, or vice versa. All tickets on which special train movements may be permitted must be tickets that have been sold at lawful fares in effect via route of actual travel.

For twenty or more first-class adult tickets, as described in the preceding paragraph, special train will be run for the number of such tickets presented, being twenty or more, and enough first-class tickets, good for passage between the points the special train is run, regardless of point of sale, to make a total of seventy-five tickets.

Minimum Collection for Each Movement.

2. The minimum collection for each movement will be $75.00.

Note.—When special service is for a round trip the charge will be the same as for special service in one direction. No allowance will be made if party uses regular train in one direction and special service in the opposite direction.

Guarantee for Special Service, Intrastate Movement in California.

3. On intrastate movements in California (movements having primary origin, final destination and entire transportation within California), business handled on special train from stations between starting point and destination shall not be taken into account as part of the guarantee except it is carried on tickets which are furnished to cover guarantee from originating point to destination. If the fares from intermediate points are less than from the originating point and business is handled on special train, it shall not be credited to the guarantee.

: Decrease. *Basing fare.
¶From Los Angeles via S. P. Co. to San Francisco or Sacramento or Stockton, thence W. P. Ry.

Hall 10 12 600 3179

Form 30 Standard

CIRCUS TRANSPORTATION CONTRACT.

Defendant's Exhibit "2" _____

This Agreement, Made in duplicate, this Third day of April 191 4.

between The ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, party of the first part,
(Insert name of Railway Company.)

and CAMPBELL'S CARNIVAL COMPANY

_____, party of the second part.

WITNESSETH, That the said Railway Company agrees to transport the train or cars of the party of the second part, bearing its Circus and Menagerie, and employes connected therewith, in one or more sections, consisting of 18 cars, classified as follows: 4 Passenger, ____ Baggage, 4 Box, 10 Platform, ____ Stock, from Phoenix, Arizona to Needles, California and to stop for exhibition at the following places, the train to arrive and leave at or about the time set forth, viz.:

STATIONS	ARRIVE	LEAVE (ABOUT MIDNIGHT)	CHARGES TO BE PREPAID AS FOLLOWS AMOUNT
Phoenix, Arizona		April 12th	$408.00
Prescott, Arizona	April 13th	April 19th	$519.00
Kingman, Arizona	April 20th	April 22nd	$200.00
Needles, California	April 23rd		
X			

Agent Phoenix will collect only Three Hundred Sixty-Eight (368) Dollars account Forty (40) Dollars being prepaid; and Agent Prescott will collect only Four Hundred Seventy-Nine (479) Dollars account Forty (40) Dollars being prepaid.

Party of first part will furnish following equipment:

One coach at rate of Fifteen (15) Dollars per day;

Four box cars at rate of Five (5) Dollars each per day;

Eight flat cars at rate of Two (2) Dollars each per day.

Rental will accrue only for time cars are held in service of party of the second part; and charge for rental will be collected by agents of party of the first part at Prescott, Kingman and Needles at rate shown above, on arrival of party of the second part at those stations.

In consideration of the premises and of the special and low rate or charge hereinafter specified and of the special undertaking of the said Railway Company, as herein provided, the party of the second part does hereby covenant and agree to release and discharge the party of the first part of and from any and all liabilities for claims and damages of every name and nature, by reason or on account of any accident or injury, from whatever cause, that may occur to or may be suffered or sustained by any one or all of the persons composing or attached to said circus company, or to the cars or other property of said party of the second part or used by said company while in or on said train or upon any of the premises belonging to or used by said party of the first part, or by reason of or on account of any delays that may occur in the running or movement of said trains, or by failure to reach the several points of destination by the specified time. And in and for the consideration above mentioned, said party of the second part does hereby further covenant and agree to protect and forever hold free and harmless said party of the first part from any and all damages or claims for damages that he or they may sustain or incur by reason of any accident or injury that may happen to or be received by any one or more of the several persons composing or attached to said circus company, or permitted by said party of the second part to ride upon said train, or upon any of the premises belonging to or used by said party of the first part. It is distinctly understood and agreed that said party of the first part does not undertake to transport said train, circus or employes, or others connected therewith, as a common carrier, but all such employes or persons transported under or in pursuance of this agreement shall and do assume all risk of injury or loss, however caused, and release and relieve said party of the first part from any and all liability for such injury or loss, whether caused by accident or through the negligence or carelessness of the employes of the party of the first part.

If, notwithstanding this contractual exemption from liability, the Railway Company shall be held liable in any court for any loss or damage suffered by the party of the second part on any account named, or others not named, it is hereby agreed, in consideration of the special undertaking of the Railway Company and the low rate of charges, that such damages shall be and are hereby liquidated and stipulated not to exceed the actual value of the animals or property aforesaid, which for the purpose of this agreement, and by reason of the said special undertaking and low rate, it is by the said second party stipulated, agreed and represented in no case to exceed the sum per head for each animal as follows, to wit:

175 *Decision and Opinion.*

In the Supreme Court of the State of Arizona.

No. 1529.

SOUTHERN PACIFIC COMPANY, Appellant,

vs.

STATE OF ARIZONA, Appellee.

Appeal from a Judgment of the Superior Court of Maricopa County. R. C. Stanford, Judge. Affirmed.

Mr. C. W. Durbrow and Mr. F. B. Austin, of San Francisco, Cal., and Mr. J. C. Forest, of Phoenix, for Appellant.

Mr. Wiley E. Jones, Attorney General, and Messrs. R. Wm. Kramer and G. W. Harben, Assistants to the Attorney General, for Appellee.

Ross, *J.*:

This is an action to recover a fine assessed against appellant by the Corporation Commission for contempt in refusing to obey an order of the Corporation Commission directing it to transport Campbell's United Shows from Tucson to Phoenix, Arizona. Authority for the action is found in Paragraph 2356, Chapter XI, Title 9, Civil Code 1913.

In the complaint were set forth all the proceedings before the Commission, including its findings of fact, conclusions of law, orders and judgments, both in the original hearing and the hearing in
176 contempt. The answer of the appellant consists of:

(1) Demurrers, general and special,—the special being that the court had no jurisdiction of either the person or subject matter;

(2) Averments that the order made and entered was not supported or sustained by any competent evidence or by any evidence whatsoever, or that any lawful proceeding was held by said Commission in the matter of fixing rates;

(3) That the Corporation Commission was without jurisdiction to fix rates for transporting Campbell's United Shows from Tucson to Phoenix for the reason, among others, that the movement of said shows between the named points was interstate in character, the said shows being engaged in a journey beginning at El Paso, Texas and extending through the states of New Mexico and Arizona into California, the destination of said Campbell's United Shows having been fixed at the City of San Bernardino, California at the time said shows began their journey at said City of El Paso; and

(4) That the Commission had no jurisdiction to make or enter said order for the further reason that there were no intrastate

177 tariffs then on file with said Commission showing the rate for the movement of privately owned equipment in circus trains or otherwise or obliging defendant to transport privately owned equipment in circus trains.

The court's findings of fact and conclusions of law are as follows:

"II.

"That on the 20th day of March, 1914, there was promulgated under the authority and seal of the Arizona Corporation Commission in Docket No. 165 of that Commission, an order to show cause, on or before the 23rd day of March, 1914, why the Arizona Corporation Commission should not issue a special rate authority compelling the defendant to publish on one day's notice, a rate for the transportation of Campbell's United Shows, consisting of eighteen (18) cars, from Tucson, Arizona, to Maricopa, Arizona, at the rate of Three Dollars ($3.00) per mile, and further requiring the defendant to furnish such equipment as was necessary to move Campbell's United Shows within the State of Arizona.

"III.

"That pursuant to said order to show cause, the defendant appeared before the Arizona Corporation Commission on the 25th day of March, 1914, and after a full and fair hearing the Arizona Corporation Commission entered the following order:

" 'That the Southern Pacific Company and Arizona Eastern Railroad Company transport the cars, property, employees and attendants of Campbell's United Shows from Tucson, Arizona, via Maricopa, to Phoenix, Arizona, and to extend to the said Campbell's United Shows the usual privileges in the movement of advance agents, for a total amount not to exceed $3.00 per train mile for the entire service.

" 'It is understood that the shipment will consist of not to
178 exceed four coaches, four large box cars, and ten flat cars, and it is further understood that the Southern Pacific Company and Arizona Eastern Railroad Company may enter into a contract covering this transportation, the terms of which shall not be in substantial variance with the contract now existing between the Arizona Eastern Railroad Company and Sells-Floto Shows Company, with respect to details as to responsibility, service and conditions, copy of said contract being on file with the Commission, and made on March 4, 1914, by and between the Arizona Eastern Railroad Company and Sells-Floto Shows Company.

" 'It is further ordered that, upon submission of evidence that any charge or charges have been exacted by respondent companies for transportation of advance agents or employees, at variance with contract herein referred to, made by respondent, Arizona Eastern Railroad Company with Sells-Floto Company that the amount or amounts so collected shall be refunded to Campbell's United Shows.'

"IV.

"That on the 28th day of March, 1914, the Arizona Corporation Commission denied the defendant's application for a re-hearing of said order recited in Paragraph III hereof.

"V.

"That said order entered by the Arizona Corporation Commission on the 25th day of March, 1914, as recited in Paragraph III hereof, was not complied with by defendant, but wholly ignored.

"VI.

"That on the 31st day of March, 1914, the State of Arizona, at the relation of George P. Bullard, Attorney General, filed a petition addressed to the Arizona Corporation Commission, praying that an order be entered, directed to the defendant, requiring it to show cause why it should not be punished for contempt of the order of the Arizona Corporation Commission, as recited in Paragraph III
179 hereof, and that pursuant to the said petition, the Arizona Corporation Commission, on the 1st day of April, 1914, entered an order, directed to the defendant, requiring it to show cause on the 13th day of April, 1914, at 10 o'clock A. M., why it should not be punished for contempt, as alleged in the said petition of the State of Arizona, at the relation of George P. Bullard, its Attorney General, as aforesaid.

"VII.

"That pursuant to said petition of the State of Arizona, at the relation of George P. Bullard, Attorney General, a hearing was had, and the defendant was adjudged guilty of a contempt of the order of the Arizona Corporation Commission, recited in Paragraph III hereof, whereupon the Arizona Corporation Commission, upon the 16th day of May, 1914, entered the following order:

"'It is therefore ordered: That the Southern Pacific Company be, and it is hereby declared in contempt of this Commission's order, in Docket No. 165, and the said company be, and it is hereby fined the sum of Fifteen Hundred ($1500.00) Dollars.

"'It is further ordered: That Arizona Eastern Railroad Company be, and it is hereby declared in contempt of this Commission's order, in Docket No. 165, and that the said company be, and it is hereby fined the sum of Five Hundred ($500.00) Dollars.

"'It is further ordered: That copies of this order be served upon Southern Pacific Company and Arizona Eastern Railroad Company, and the Attorney General of the State of Arizona, and unless the fines, as herein imposed, be paid and satisfied on or before June 1, 1914, that the Attorney General shall proceed to the collection of same as provided by law.'

"VIII.

"That the defendant refused to pay and satisfy the fine im-
180 posed by said order of the Commission, as recited in Paragraph VII herein, on or before June 1, 1914, and thereupon, to-wit: Upon the 20th day of June, 1914, the State of Arizona filed with the above entitled Court its complaint against the defendant, which prayed for the recovery of the sum of Fifteen Hundred ($1500.00) Dollars, the fine assessed against the defendant by the Arizona Corporation Commission for a contempt of the order of said Arizona Corporation Commission, as recited in Paragraph III hereof.

"IX.

"That the defendant engaged itself to transport for hire circuses and other institutions similar to that conducted by Campbell's United Shows, which the defendant was required to transport, as provided by the order recited in Paragraph III hereof.

"Conclusions of Law.

"The Court from the above Special Findings of Fact concludes as a matter of law therefrom, as follows:

"I.

"That the Arizona Corporation Commission had jurisdiction of the person of the defendant and the subject matter of the action, and was authorized and empowered by the Constitution and laws of the State of Arizona to enter the order as recited in Paragraph III of the Special Findings of Fact, and to adjudge the defendant in contempt for a refusal to obey said order.

"II.

"That the above entitled Court has jurisdiction of the person of the defendant, and the subject matter of the above entitled cause of action, and is empowered by the Constitution and laws of the State of Arizona to enforce and collect the fine imposed upon the de-
181 fendant by the Arizona Corporation Commission for a violation of the order of that Commission, as recited in Paragraph III of the Special Findings of Fact herein.

"III.

"That the order of said Arizona Corporation Commission, as recited in Paragraph III of the Special Findings of Fact, in no way imposed a burden upon interstate commerce, in contravention of Section 8 of Article I of the Constitution of the United States.

"IV.

"That it was the duty of the defendant, under the Constitution and laws of the State of Arizona, to transport Campbell's United Shows, as provided by the order of the Arizona Corporation Commission, as recited in Paragraph III of the Special Findings of Fact, even though it acted in such capacity as a private carrier, for the reason that it had held itself out and engaged to transport circuses and other institutions similar to Campbell's United Shows.

"V.

"That even though the defendant, in the transportation of Campbell's United Shows, engaged itself as a private carrier, it so engaged itself as a carrier for hire, and was, under the Constitution and laws of the State of Arizona, subject to regulation by the Arizona Corporation Commission.

"VI.

"That the order of the Arizona Corporation Commission as recited in Paragraph III of the Special Finding of Fact did not impair the liability of the defendant as a private carrier.

"VII.

"That the plaintiff is entitled to judgment against the defendant for the sum of Fifteen Hundred ($1500.00) Dollars."

182 The questions raised on this appeal by the appellant in its assignments of error are whether the original proceeding by the Corporation Commission fixing the rate to be charged Campbell's United Shows for transportation from Tucson to Phoenix was null and void for the reason: (1) That there was no formal complaint filed against the appellant with the Corporation Commission either on its own motion or on the motion of any third party; that at the hearing the witnesses who made statements to the Commission in the nature of evidence were not sworn; and (2) if these statutory requirements and formalities were waived by the appellant, whether the movement of Campbell's United Shows was an interstate transaction and, therefore, not within the jurisdiction of the State Corporation Commission; also (3) whether the Corporation Commission had jurisdiction to make its order requiring the appellant to enter into a special contract as a private carrier for the transportation of the privately owned equipment of Campbell's United Shows; and (4) whether the statute authorizing the assessment of a fine for disobedience of its order is constitutional.

183 We do not think that the appellant is in a position to complain of the informal and irregular manner in which the proceeding was instituted before the Commission, nor because

the witnesses were not sworn. A formal complaint setting forth a grievance against the appellant should have been filed and, of course, the testimony should have had the sanctity of an oath. These things seem to be required by the statute and by the rules of the Corporation Commission—Paragraph 2336 Civil Code 1913, and Rule 5 of Practice and Procedure A. C. C. The omission to follow the statute and the rules of the Commission, when concurred in by the appellant, as was done in this case, no prejudice being apparent, ought not now to be permitted to upset the whole proceeding. Although this question could have been presented to the Corporation Commission by appellant on its motion for a rehearing, it was not done. Paragraph 2342, id., among other things, provides:

"No cause of action arising out of any order or decision of the commission shall accrue in any court to any corporation, or person, or the state, unless such corporation or person, or the state, shall have made, before the effective date of said order or decision, application to the commission for a rehearing.

184 Such application shall set forth specifically the ground or grounds on which the applicant considers said decision or order to be unlawful. No corporation or person, or the state, shall in any court urge or rely on any ground not set forth in said application."

Again it is provided, Paragraph 2329, id., that the Commission shall not be bound by the technical rules of evidence and that informality in proceedings or in taking testimony shall not invalidate any order, decision or rule approved by the Commission.

Of course if the movement of Campbell's United Shows from Tucson to Phoenix was an interstate movement the order of the Commission was void for want of jurisdiction over the subject matter. The evidence shows that this show was traveling around over the country giving exhibitions; that early in February, 1914 it was at El Paso, Texas; that at that time its agent inquired of the appellant for rates from that place through New Mexico into Arizona with a probable destination into California. No arrangement was effected between the appellant and Campbell's United Shows for transportation over appellant's line of railway. The shows, in fact, under a special contract with the El Paso & Southwestern Railroad Company were transported from El Paso

185 to Tucson with stop-overs at Douglas and Bisbee. When the show people made application to the appellant at Tucson for a contract to transport their equipment and entourage from Tucson to Phoenix appellant stated to them that it could not make a contract as a common carrier; that it had already entered into a contract with Sells-Floto Shows to transport them from Tucson to Phoenix and that under the rules it could not transport Campbell's United Shows for a space of thirty days after the Sells-Floto Shows had been transported.

In the hearing before the Corporation Commission in the matter of fixing a rate the attorney for the appellant gave two reasons for not entering into a contract with Campbell's United Shows. First,

he said: "We wish to take the position we are not common carriers for circuses and carnivals; we want that in the record"; and second, "I am not acquainted with this special thirty day contract, but I understand there is an agreement between all show people as well as railroads to keep the shows spaced. This show coming in before Sells-Floto and with which the Company has a contract, if he tenders the money—the freight at the regular rate, we
186 have to carry him."

These were the only reasons suggested by the appellant at the hearing before the Commission for not entering into a contract to transport Campbell's United Shows from Tucson to Phoenix. There was no suggestion or intimation at that time that the movement was an interstate movement, although the evidence discloses that the agent for Campbell's United Shows stated that the show would go from Phoenix to Prescott, Clarkdale and Kingman and from Kingman to Needles, California.

It developed that appellant and other railroads of this section of the country had been accustomed to enter into contracts of transportation with circuses and carnival shows at rates very much less than the regular tariffs and containing terms of exemption from the liability of common carriers; that Campbell's United Shows had such a contract in 1913 with appellant and other roads in this and contiguous states.

It was in this action that appellant raised the question of the interstate character of the movement from Tucson to Phoenix, claiming it as an integral part of a continuous transportation from El Paso, Texas through New Mexico and Arizona to San Ber-
187 nardino, California, and in support thereof introduced evidence of a contract with the Santa Fe to move Campbell's United Shows from Phoenix to Prescott, Clarkdale, Kingman and thence into California.

It is evident that when Campbell's United Shows started from El Paso, Texas on the peregrenations of a traveling show it had mapped out a route traversing several states and one familiar with the wanderings of such institutions would not undertake to place limitations upon its rovings by fixing its ultimate destination or many digressions from original plans. Its movements may be likened to that of a sightseer in going from one state into another on a common carrier and, like the common carrier, both are subject to the rules, regulations and laws applicable to interstate commerce. Each is entitled to and must pay the tariff rates as promulgated or approved by the Interstate Commerce Commission, but where the movement is wholly intrastate, and to be consummated under a separate and independent contract of transportation, even though it be an advance step along the general route outlined at the beginning of the trip, we think it is the subject of state
188 control and regulation. Having arrived in a state the show or traveler in "doing" the state could not claim or demand the schedule rate for interstate transportation, but must pay at the local or intrastate rate as long as the movement is from one stop in the state to another stop in the state.

We think the decision reached by the Supreme Court of the United States in Gulf, Colorado & Santa Fe Railway Company v. Texas, 204 U. S. 403, is decisive of this case.

The salient facts in the above case were: Two carloads of corn were shipped from Hudson, South Dakota with ultimate destination Goldthwaite, Texas; the first lap of the movement was from Hudson to Texarkana, Texas; at this place a change of ownership was effected and a bill of lading issued to the new owner, calling for the transportation of the two identical cars and contents from Texarkana, Texas over the lines of the Texas & Pacific Railway Company and the Gulf, Colorado and Santa Fe Railway Company to Goldthwaite, to be delivered there to Saylor & Burnett, the last consignee and for whom the two carloads of grain were intended when first started on their journey from Hudson, South Dakota.

The Gulf, Colorado & Santa Fe Railway Company refused
189 to accept the charges from Texarkana to Goldthwaite as prescribed by the State Railroad Commission and demanded and collected a larger sum, based upon the interstate rate. The State of Texas, in a statutory action for extortion, recovered judgment in the Texas courts; the railroad company appealed to the Supreme Court of the United States, contending that the movement from Texarkana, Texas to Goldthwaite, Texas was but an integral part of the movement from Hudson, South Dakota to Goldthwaite, Texas and interstate in character.

The Supreme Court, speaking through Justice Brewer, said:

"The single question in the case is whether, as between Texarkana and Goldthwaite, this was an interstate shipment."

Further on he said:

"It is undoubtedly true that the character of a shipment, whether local or interstate, is not changed by a transfer of title during the transportation. But whether it be one or the other may depend on the contract of shipment. The rights and obligations of carriers and shippers are reciprocal. The first contract of shipment in this case was from Hudson to Texarkana. * * * The control over goods in process of transportation, which may be repeatedly changed by sales, is one thing; the transportation is another thing, and follows the contract of shipment, until that is changed by the agreement of owner and carrier."

190 And the Court further said that the "thought or purpose" of the shipper of the corn as to its further disposition "was a matter immaterial so far as the completed transportation was concerned," and illustrated his meaning in the following language:

"In this respect there is no difference between an interstate passenger, and an interstate transportation. If Hardin, for instance, had purchased at Hudson, a ticket for interstate carriage to Texarkana, intending all the while after he reached Texarkana to go on to Goldthwaite, he would not be entitled on his arrival at Texarkana to a new ticket from Texarkana to Goldthwaite at the proportionate fraction of the rate prescribed by the Interstate Commerce Commission for carriage from Hudson to Goldthwaite. The one contract of the railroad companies having been finished he must make a new

contract for his carriage to Goldthwaite, and that would be subject to the law of the State within which that carriage was to be made."

Gulf, Colorado & Santa Fe Railway Company v. Texas has been followed and approved by the following:

Chicago, Milwaukee & St. Paul Railway Co. v. State of Iowa, 233 U. S. 334; S. C. 152 Iowa 317;

Penna. R. R. Co. v. Mitchell, 238 U. S. 251;

United States v. Philadelphia & R. Ry. Co., 232 Fed. 946;

Acme Cement Plaster Co. v. Chicago & Alton Railroad Co., 17 I. C. C. Rep. 220.

191 In Chicago, Milwaukee & St. Paul Railway Co. v. Iowa, supra, it is said:

"But the fact that commodities received on interstate shipments are reshipped by the consignees, in the cars in which they are received, to other points of destination, does not necessarily establish a continuity of movement or prevent the reshipment to a point within the same State from having an independent and intrastate character. Gulf, Colorado & Santa Fe Rwy. Co. v. Texas, 204 U. S. 403; Ohio Railroad Commission v. Worthington, 225 U. S. 101, 109; Texas & N. O. R. R. Co. v. Sabine Tram Co., 227 U. S. 111, 129, 130. The question is with respect to the nature of the actual movement in the particular case."

In Campbell's United Shows, including entertainers, attendants and employees, there were about 110 "passengers" not distinguished in the application of the law from ordinary passengers when seeking transportation from a common carrier. The rest of the show consists of baggage, animals and some railroad equipment, the movements of which were necessarily coincident with the movement of the troop of entertainers, attendants and employees.

The three principal cases relied upon by the appellant to sustain his contention that the carriage of the Campbell's Shows from Tucson to Phoenix was an integral part of a continuous movement from El Paso, Texas through New Mexico and Arizona to California

192 and, therefore, interstate in character are:

Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498;

Ohio Railroad Commission v. Worthington, 225 U. S. 101;

Texas & New Orleans Railroad Co. v. Sabine Tram Co., 227 U. S. 111.

These cases all pertained to foreign commerce originating in the interior of the United States and at the time the shipments were started on their journey they were definitely destined to some foreign port. The very nature and character of the movements required different carriers and changes of billing at the point of exportation and some times before reaching the point of exportation, hence it is said in those cases that the mere "accident" of bills of lading and forms of contract of transportation does not change the movement from an interstate or foreign to an intrastate movement. Commenting upon those cases in Louisiana Railroad Commission

v. Texas & Pacific Railway Co., 229 U. S. 336, reading at page 341, the Court said:

"In those cases there was necessarily a local movement of freight, and it necessarily terminated at the seaboard. But it was decided that its character and continuity as a movement in foreign commerce did not terminate, nor was it affected by being trans-
193 ported on local bills of lading. The principle enunciated in the cases was that it is the essential character of the commerce, not the accident of local or through bills of lading, which determines Federal or state control over it. And it takes character as interstate or foreign commerce when it is actually started in the course of transportation to another State or to a foreign country."

Penna. R. R. Co. v. Clark Coal Co., 238 U. S. 456.

The articles involved in those cases, to-wit, cottonseed cake and cottonseed meal, coal and lumber, were all articles of merchandise, the subjects of barter and sale. The stoppage of them occasioned by the necessities of transportation during the course of their movement from the initial to the terminal points of shipment on a continuous movement to another state or foreign country may truthfully be said to be mere "accidents" of the movement. It is not so with a circus or carnival show where the stops are not "incidents" or "accidents" of the movement, but are the only means by which the purpose of a circus or show may be accomplished, the movement of a circus and show being a mere accident to the object of its existence,—the giving of exhibitions.

It is next contended that the Corporation Commission was without jurisdiction to make its order requiring appellant to
194 transport Campbell's United Shows from Tucson to Phoenix, because no intrastate tariffs had been filed with the Commission showing the rates for movement of privately owned equipment in circus trains or otherwise, or obliging appellant to transport privately owned equipment in circus trains. That the appellant was under no common law obligation to accept the privately owned equipment of Campbell's United Shows we think is well settled. It could entirely refuse to accept such transportation or if it should accept it the law permitted the common carrier to dictate the terms upon which the privately owned equipment of such a concern was transported.

Clough v. Grand Trunk Western Railway Co., 155 Fed. 81, and cases there cited.

The rule of the common law prevails in this jurisdiction unless it has been changed and modified by statute. Looking to our statutes and to our Constitution, we are satisfied that the common law rule has been abrogated in this State so as to make it obligatory upon common carriers to accept and transport the privately owned equipment of circuses and other show outfits under the rules, regulations and rates, when reasonable and just, prescribed by the Corporation Commission.

195 Article XV, Section 2 of our Constitution provides that:

"All corporations other than municipal engaged in carrying persons or property for hire * * * shall be deemed public service corporations."

Section 3 provides that:

"The Corporation Commission shall have full power to, and shall, prescribe just and reasonable classifications to be used, and just and reasonable rates and charges to be made and collected, by public service corporations within the State for service rendered therein, and make reasonable rules, regulations and orders, by which such corporations shall be governed in the transaction of business within the State, and may prescribe the forms of contracts and the system of keeping accounts to be used by such corporations in transacting such business."

Chapter XI, Title 9, Civil Code 1913, known as the "Public Service Corporation Act," provides for the organization, powers and jurisdiction of the corporation commission. In Section 2278 thereof, Subdivisions E and F, the term "transportation of persons" is defined to include every service in connection with or incidental to the safety, comfort or convenience of the person transported and the receipt, carriage, and delivery of such person and his baggage; and the term "transportation of property" is defined to include every service in connection with or incidental to the transportation
196 of the property. Subdivision Z, the term "public service corporation" is defined to include every common carrier and further declares it to be subject to the jurisdiction, control and regulation of the commission under the provisions of this Chapter.

Section 2289 provides that: "All charges made, demanded or received by any public service corporation * * * for any service rendered or to be rendered, shall be just and reasonable." And prohibits unjust or unreasonable charges or demands for any service.

Section 2290 requires every common carrier to file with the commission schedules showing the rates, fares, charges and classifications for transportation between termini, within this state, of persons and property from each point upon its route to all other points thereon. It also requires every public service corporation, other than a common carrier, to file with the commission, under such rules and regulations as may be prescribed, like schedules.

Section 2295 reads as follows:

"No public service corporation shall, as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any cor-
197 poration or person to any prejudice or disadvantage. No public service corporation shall establish or maintain any unreasonable difference as to rates, charges, service, facilities or in any other respect, either as between localities or as between classes of service. The commission shall have the power to determine any question of fact arising under this section."

Section 2307 vests the Corporation Commission with power and jurisdiction to supervise and regulate every public service corpora-

tion in the state and to do all things convenient and necessary in the exercise of such power and jurisdiction.

Section 2308 empowers the Commission, after a hearing, if it shall find any contract affecting rates, fares, charges or classification to be unjust, unreasonable, discriminatory or preferential, to determine the just, reasonable or sufficient rates, fares, charges and classifications for contracts to be thereafter observed; and further authorizes this action of the Commission upon a single rate, fare, charge or contract.

We think it was the intention of the law, both constitutional and statutory, that the Corporation Commission should have plenary power over every public service corporation transacting business in this state of a local nature. That this power of supervision extends to contracts for the transportation of both persons and prop-
198 erty, whether effected in the capacity of private carrier or common or public carrier. Nor do we think that appellant can complain because it had neglected to file with the Commission tariffs showing the rates for the movement of privately owned equipment of circuses and like organizations. These omissions may be excused, as stated by the Interstate Commerce Commission in its rules concerning circuses and other show outfits, owing to "the peculiar nature of this traffic and the difficulties of establishing rates thereon in advance of shipper's request describing the character and volume of the traffic offered," but it cannot justify a refusal upon application to fix just and reasonable rates or to enter into just and reasonable contracts.

For the first time the appellant raises the question in this Court that the statute, Section 2357, under which the Corporation Commission assessed the fine in question, is unconstitutional and void. The attorney for the appellant in the trial court during the course of the trial entered into the following oral stipulation:

199 "I am going further * * * and stipulate that if the Arizona Corporation Commission had power and authority and proceeded regularly as required by the statutes of the State of Arizona to enter the original order compelling us to promulgate and apply this original rate that they ordered, that then they have taken sufficient proceedings to adjudge us in contempt. That narrows the issues to determine whether or not the Commission in first instant entered a valid order, their original order."

Notwithstanding this stipulation it is now urged that the law is unconstitutional because of the excessive fines and penalties provided, and we are referred to the cases of Bonbright v. Geary, 210 Fed. 44, and Van Dyke v. Geary, 218 Fed. 111 as authority for this contention. The question involved in those cases is not the one involved here. Those cases involved the danger of the public utility incurring a liability for every day the order of the Commission was not observed or obeyed pending an appeal to determine the validity of the order issued by the Commission,—the statute, Section 2352, making every violation of any order, etc. a separate and distinct offense and in case of a continuing violation each day's continuance thereof a separate and distinct offense.

We think it is clear from a reading of those decisions that it was not so much the severity of the penalty as the daily cumula-
200 tion of penalties while testing the legality of the Commission's action that influenced the decisions against the validity of the law. In the Van Dyke case, Sawtelle, District Judge, quoted from Ex Parte Young, 209 U. S. 123-144, the contention of the complainants as follows:

"'The contention is urged by the complainants in the suit that the company is denied the equal protection of the laws and its property is liable to be taken without due process of law, because it is only allowed a hearing upon the claim of the unconstitutionality of the acts and orders in question, at the risk, if mistaken, of being subjected to such enormous penalties, resulting in the possible confiscation of its whole property, that rather than take such risks the company would obey the laws, although such obedience might also result in the end (though by a slower process) in such confiscation. * * * Coming to the inquiry regarding the alleged invalidity of these acts, we take up the contention that they are invalid on their face on account of the penalties.'"

Further quoting from the Young case:

"'We hold, therefore, that the provisions of the acts relating to the enforcement of the rates, either for freight or passengers, by imposing such enormous fines and possible imprisonment as a result of an unsuccesful effort to test the validity of the laws themselves, are unconstitutional on their face, without regard to the question of the insufficiency of those rates.'"

The decision in the Van Dyke case was limited in this language:

201 "On the authority of these cases and on principle we are of the opinion, and so decide, that said Act 90 of the First Legislature of the state of Arizona imposes such penalties and imprisonment as to practically deprive the complainant of the right to appeal to the court to determine the validity of the law and the orders of the corporation commission, and is therefore unconstitutional in that particular."

The order here applies to a single rate for one trip only. It was not a permanent order and could not be violated but once; no daily accumulation of penalties or fines could result from its disobedience; the appellant took no chances of incurring accumulated fines and penalties in prosecuting this appeal and, not being affected by the feature of the law held unconstitutional in the Van Dyke and Bonbright cases, is not in a position to raise the question.

The judgment of the lower court is affirmed.

HENRY D. ROSS, *Judge.*

I concur:

ALFRED FRANKLIN, *Chief Justice.*

CUNNINGHAM, *J.* (dissenting):

The essential question in this case is whether the movement of the Campbell's United Shows from Tucson to Phœnix via Maricopa,

a movement wholly within the State of Arizona, is a move-
202 ment of interstate commerce and under the protection of Section 8, Article I, of the United States Constitution. If in fact such movement was interstate commerce, the Arizona Corporation Commission, by its order made and entered on March 25th, 1914, exceeded its jurisdiction by fixing a transportation rate chargeable for the movement, and the order so made was void and incapable of initiating a duty on the railroad company.

The trial court made special findings of fact and stated its conclusions of law therefrom. The court in its findings of fact does not find any fact nor refer to any testimony which shows or tends to show the points from and to which the Shows moved on the journey. The findings are limited to the movement from Tucson to Phoenix within the State of Arizona. The conclusions of law on this issue are equally unsatisfactory. In the third paragraph of the conclusions of law the court finds as a fact, not as a matter of law, that the order of the Corporation Commission made and entered on March 25th 1914, "in no way imposed a burden upon Interstate Commerce."

203 Inferentially the trial court must have believed that the movement of the said Shows between the points in question was not in fact a movement of interstate commerce, but the fact was not found by the court.

A careful examination of the opinion of the Arizona Corporation Commission annexed to the complaint in this case, the basis for the order of March 25th 1914, will disclose that the Corporation Commission did not consider the matter of the beginning and termination of the journey laid out by the Campbell's United Shows, but only took into its consideration the matter of the reasonableness of rates charged by railroad companies for transportation between points in Arizona. The issue of fact whether the movement was interstate commerce is squarely presented in this case, and is the controlling issue joined and incapable of determination in the absence of evidence of the entire journey.

The defense introduced substantial evidence tending to show that it moved the Campbell's United Shows from Tucson to Phoenix under a rate prescribed by the Federal Interstate Commerce
204 Commission; that said Shows were moved from Phoenix to a point within the State of California stopping at a number of points along the course of the journey, but the movement was made pursuant to special rate contracts. The defendant introduced evidence tending to show that about March 6th 1914, the Campbell's United Shows opened negotiations with defendant, Southern Pacific Company, for transportation "Between Tucson and Phoenix, with a probable movement to other points in Arizona and in California, at that time explaining that they were coming from Deming, New Mexico, into Tucson over the El Paso and Southwestern."

The reporter's notes of the hearing before the Corporation Commission resulting in the order of March 25th 1914, and introduced as a portion of plaintiff's Exhibit B in this cause, disclose that the

representative of Campbell's United Shows, Mr. E. L. Williams, being examined before the Commission was asked:

"Where do you propose to go from here?

"Mr. Williams: From here to Prescott, Clarkdale and Kingman and from Kingman to Needles and then into California."

The evidence is therefore without conflict that the starting
205 place of this organization of shows was Deming in the State of New Mexico, and its stopping place was within the State of California, the exact point in contemplation is left in doubt by the evidence, but that the route for the journey determined upon in advance of starting from Deming, New Mexico, was through Arizona to Needles in the State of California with the expectation of frequent stops incidentally along the course of the proposed journey, is clearly shown. The transportation companies were informed of the proposed route of travel from the place of beginning to its termination at Needles, California, at least. The proposed incidental stopping places were not disclosed, nor, perhaps, fully determined upon. That the Shows would stop at Tucson and at Phoenix, however, was definitely determined, of which stops the transportation companies involved had information. These facts were shown before the Corporation Commission before its order was made on March 25th 1914, and upon the trial of this cause the facts are undisputed. Notwithstanding these very vital and controlling facts before the court, directly bearing on and prima facie establish-
206 ing the defendant's alleged defense, no special finding or any finding with regard thereto was made by the court.

Passengers, baggage and freight, move in interstate commerce and are therefore subject to the exclusive regulation of the laws of Congress under Section 8 of Article I of the United States Constitution when the movement is commenced in one of the states with the intention that such movement shall continue an dultimately terminate with another state, and that intention is consummated. It is not the contract for the rate of transportation which controls the character of the movement. The incidental interruption of the movement along its course, either voluntarily or involuntarily, is not the controlling factor. It is the commencement and ending of the continuous journey in contemplation with which the movement begins, which fixes the character of interstate commerce upon the thing moved. The several contracts of transportation of the interstate commerce pursuant to which the movement is commenced and continued to its terminus does not fix the character of the thing moved. The fact that the movement is not intended to
207 proceed without incidental stopovers, or under one contract, or that any of the transportation companies handling the movement acts for itself and not in conjunction with the other connecting companies in the movement of the thing, do not impair the interstate commerce character of the thing moved, nor the movement participated in by the several transporting companies. Hence the evidence establishes the fact that the movement of the Campbell's United Shows from Tucson to Phoenix was a movement along a connecting link of the journey contemplated and commenced at Deming in the State of New Mexico, and intended to terminate

within the State of California, in the course of which journey the intention of the shipper was to pass over the Southern Pacific Company's road from Tucson to Phoenix in the State of Arizona, as a definite portion and continuation of such journey, of which intention the Southern Pacific Company had full notice.

As a conclusion of law from these facts, the said Shows, when they commenced the journey, and continuing on the journey from Tucson to Phoenix, were in character moved in interstate com-
208 merce. The attempt of the Arizona Corporation Commission to prescribe rates chargeable for such movement of such interstate commerce is an interference with a matter with which the said Corporation Commission has no jurisdiction, and as a consequence the order violated by the Southern Pacific Company was void, and its violation did not subject the Southern Pacific Company to punishment.

When goods have been delivered to a carrier for transportation to a destination in another state and when they have actually started in the course of transportation to another state, such goods are in interstate commerce.

Southern Pac. Terminal Co. v. Interstate Commerce Commission and Young, 219 U. S. 498, 55 L. ed. 310;

Texas & N. O. R. R. Co. v. Sabine Tram Co., 227 U. S. 111, 57 L. ed. 442;

Railroad Commission v. Worthington, 225 U. S. 101, 56 L. ed. 1004;

United States v. Union Stock Yard, 226 U. S. 286, 57 L. ed. 226;

Gulf, C. & S. F. R. Co. v. Texas, 204 U. S. 403, 51 L. ed. 540;

Easdale v. A. T. & S. F. Ry. Co., (Kansas) 164 Pac. 164; citing:

Louisiana R. R. Comm. v. T. & P. Ry., 229 U. S. 336, 33 Sup. Ct. 837, 57 L. ed. 1215; and,

209 A. T. & S. F. Ry. Co. v. Harold, 241 U. S. 371, 36 Sup. Ct. 665, 60 L. ed. 1050.

Hence, if the movement from Deming, New Mexico, to Tucson, Arizona, is considered as a completed transportation, certainly the movement from Tucson was commenced to terminate ultimately in the State of California, and the movement on the journey commenced, the object moved became impressed with the character of interstate commerce and the regulation of such movement as to rates of transportation remained exclusively with the Interstate Commerce Commission, because that authority had acted in the matter and prescribed the rate chargeable for the transportation of such class of commerce.

The judgment in this case is not sustained by the evidence nor by the law. I am of the opinion that the judgment should be vacated and the cause dismissed for the reason the Arizona Corporation Commission did not have power to make and enter the order of March 25th, 1914, and therefore such order was a nullity and the appellant's failure to obey the order created no liability to punishment.

D. L. CUNNINGHAM, *Judge*.

210 Endorsement.

Title of Court and Cause.
Opinion.
Filed: May 19th, 1917. C. F. Leonard, Clerk Supreme Court of Arizona.

211 In the Supreme Court of the State of Arizona.

No. 1529.

SOUTHERN PACIFIC COMPANY, a Corporation, Defendant and Appellant,

vs.

STATE OF ARIZONA, Complainant and Appellee.

Motion for a Rehearing.

To the Honorable the Judges of the Supreme Court of the State of Arizona:

The appellant, Southern Pacific Company, hereby respectfully move- the Court, pursuant to Rule Three of this Court, Paragraph 1275 Revised Statutes, Arizona Civil Code, 1913, that a rehearing be granted herein.

The judgment of the Superior Court of the State of Arizona in and for the County of Maricopa, was affirmed by this Court by an
212 opinion filed herein on May 19th, 1917, written by his Honor, Supreme Court Judge Ross, and concurred in by his Honor, Supreme Court Judge Franklin.

The rehearing is asked for on the grounds which may be stated briefly, as follows:

Plaintiff below sued to recover a fine of $1500.00 imposed upon Southern Pacific Company, defendant below, by the Arizona Corporation Commission on the 16th day of May, 1914, declaring defendant in contempt of the Commission's order of date March 25th, 1914, which said order commanded the said defendant carrier to transport the cars, property, employees and attendants of Campbell's United Shows from Tucson, Arizona, to Phoenix, Arizona, at a rate not to exceed $3.00 per train mile for the entire service.

The show was moved under circus transportation contracts from El Paso, Texas, through the State of New Mexico, into Arizona, (at Folio- 269 to 271), and from Phoenix, Arizona, to Needles,
213 California, under same kind of contracts (at Folios 343 to 348), and it appears from the testimony of Mr. Williams, the shipper (at Folio 270), that it was intended by him at the time the show left El Paso that the shipment would move through the State of New Mexico into the State of Arizona and (at Folio 285) onward to Needles in the State of California.

The first point made by this petition for a rehearing is, that in view of the interstate character of the shipment, as shown by the oral testimony, and the circus transportation contracts above referred to, the plaintiff was without remedy before the Arizona Corporation Commission because this question is cognizable only by the Interstate Commerce Commission.

It is therefore respectfully submitted:

(1) That the record clearly shows that it was intended by the shipper before the shipment left its point of origin (El Paso), that the shipment would move from Texas through the states of
214 New Mexico and Arizona and onward into the State of California.

(2) That as a matter of fact the shipment did move in accordance with the shipper's original intention from its point of origin in the State of Texas through the states of New Mexico and Arizona and onward into the State of California.

It is further respectfully represented by this petition that in deciding as the Court did, that the movement in question was one in Intrastate Commerce and not in Interstate Commerce, this Court based its opinion in that respect solely on the four cases cited in the opinion, and failed to give proper and controlling weight to the provisions of the Federal Constitution and Statutes, and to the decisions of the Federal Courts interpreting and applying such Constitution and Statutes which solely govern this case.

The case of Gulf, Colorado & Santa Fe Ry. Co. vs. Texas, cited by the Court in its opinion and held to be decisive in this case, is
215 not in point because, as the Court held in substance *that* the interstate character of this shipment ended when the cars reached their destination at Texarkana, Texas. Unlike the case at bar, it was not intended at any time by anyone connected with that movement that the cars would be moved from Texarkana, Texas, to a point beyond the borders of the State of Texas, and as a matter of fact did not move to a point outside the State of Texas. How entirely different from the case at bar! As was intended by the shipper from the very inception of the movement, this show was moved to a point beyond the borders of Arizona and into the State of California.

C. M. & St. P. Ry. Co. vs. Iowa, is subject to the same objection in that, the interstate character of the movement of the coal in question, ended when it reached Davenport, that point being the certainty as to point of destination. If it was to be shipped to points beyond Davenport, that was to be determined after the arrival of the coal at Davenport.

216 Penna. R. R. Co. vs. Mitchell, United States vs. Philadelphia & R. Ry. Co., Acme Cement Plaster Co. vs. A. R. R. Co., are, we submit, subject to the same objections as the two previous cases mentioned.

II.

That in deciding as the Court did, that a formal complaint setting forth a grievance against the appellant should have been filed, and of course, the testimony should have had the sanctity of an oath, as

required by Paragraph 2336 Civil Code, 1913, and Rule 5 Practice and Procedure, A. C. C. that therefore, it is immaterial what the record facts are upon which waiver is found, because there was no issue framed by any pleadings whatever before the Commission, and the Commission and the Court below had no power to determine the questions passed upon.

217 Paragraph 2342, cited by the Court is not applicable to this action, because appellant was not the plaintiff seeking to set aside an order of the A. C. C., but was the defendant resisting an action brought by the State to recover a fine imposed by the A. C. C.

III.

That in deciding, as the Court did, that the common law rule has been abrogated in this state so as to make it obligatory upon common carriers to accept and transport the privately owned equipment of circuses and other show outfits, under the rules, regulations and rates, when reasonable and just, prescribed by the Corporation Commission, the Court failed to give proper and controlling weight to the proposition, that, in the constitutional provisions, and statutory enactments cited by the Court, reference is made solely to common carriers and not to private carriers.

Neither by constitutional provisions nor by statutory law has Arizona ever attempted to regulate private carriers, and from

218 the very nature of that business, could not.

IV.

In declining to follow the cases of Bonbright vs. Geary, 210 Fed. 44, and Van Dyke vs. Geary, 218 Fed. 111, holding *that* the law (Paragraph 2357, Civil Code, Arizona, 1913), under which the Corporation Commission imposed the fine in this case, unconstitutional, for the reason as stated by this Court, that the question involved in those cases is not the one involved here, in that, in those cases the danger of the public utility incurring a liability for every day the order of the Commission was not observed or obeyed pending an appeal to determine the validity of the order issued by the Commission—the statute, Paragraph 2352, making every violation of every order, etc., a separate and distinct offense, and in

219 case of a continuing violation, each day's continuance thereof, a separate and distinct offense, this Court failed to give proper and controlling weight to the case of Wadley Southern Railroad Company vs. Georgia, 235 U. S. 651, 59 Lawyers' Edition 406, in which case the court said:

"In considering that question in the present case, the constitutionality of the act involved is not to be decided by the conduct of the plaintiff in error, nor by the fact that the state only asked a penalty for one day's disobedience instead of many.

"Neither can the statute be construed as a single legislative act. It must be treated as a part of a system of laws creating the railroad commission, defining its powers and subjecting it to suit."

220 **In Conclusion.**

It is respectfully submitted, therefore, that in view of the foregoing and especially in view of the very recent Supreme Court decision last cited, a rehearing herein should be granted.

In the event that this petition is granted we do not waive the other points for reversal made by appellant, but we believe the points we make in this petition to be sufficient to dispose of this case.

Dated June 1st, 1917.

Respectfully submitted,

C. W. DURBROW,
F. B. AUSTIN,
J. C. FOREST,
Attorneys for Appellant.

221 **Endorsements.**

No. 1529. In the Supreme Court of the State of Arizona.

No. 1529.

Southern Pacific Company, a Corporation, Defendant and Appellant, vs. State of Arizona, Complainant and appellee.

Petition for rehearing.

Appeal from the Superior Court of the State of Arizona, in and for the County of Maricopa.

C. W. Durbrow, F. B. Austin, J. C. Forest, Attorneys for Appellant.

Five copies of the within Brief filed in my office this 1st day of June, 1917. C. F. Leonard, Clerk of the Supreme Court of the State of Arizona.

222 (Title of Court and Cause.)

Order Denying Motion for Rehearing.

At this day it is ordered, that the Motion for Rehearing filed herein by appellant be and the same is hereby denied.

(Entered June 22nd, 1917.)

(Title of Court and Cause.)

Petition for Writ of Error.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the State of Arizona:

The petition of Southern Pacific Company, a corporation, the defendant and appellant in the above entitled action, respectfully shows:

I.

That the above named appellee, the State of Arizona, as plaintiff, on June 20, 1914, commenced an action in the Superior
223 Court in and for the County of Maricopa, State of Arizona, to recover a fine theretofore imposed upon the Southern Pacific Company by the Arizona Corporation Commission in certain proceedings in contempt instituted before the Commission because of appellant's failure to comply with a certain order of the Commission. The complaint in said action, which was filed June 20, 1914, recited the proceedings before the Commission, which were substantially as follows:

On March 20, 1914, the Arizona Corporation Commission made and served upon the appellant an order to show cause why the appellant should not publish a special rate of $3 per mile for the transportation of Campbell's United Shows from Tucson to Maricopa, both of these points being in the State of Arizona. Southern Pacific Company appeared before the Commission on March 23, 1914, the time fixed, and an informal hearing was held at which none of the witnesses were sworn, nor was any formal complaint ever filed. Thereafter on March 25, 1914, the Commission made and entered an order requiring Southern Pacific Company to transport Campbell's United Shows from Tucson to Maricopa,
224 Arizona, at a rate not exceeding $3 per train mile, the equipment to be thus transported being designated in said order which was subsequently served upon the appellant.

Thereafter, and on March 28, 1914, the Commission made and entered an order denying appellant's application for a rehearing.

Southern Pacific Company having refused to comply with this order, the Commission, at the relation of the Attorney General of the State of Arizona, whose petition was filed with the Commission on March 31, 1914, made an order to show cause on April 1, 1914, requiring Southern Pacific Company and its co-defendant, the Arizona Eastern Railroad Company, to appear and show cause before the Commission on April 13, 1914, why they should not be punished for contempt. A hearing was had before the Commission on the day last mentioned and thereafter, on May 16, 1914, the Commission entered an order finding both of the defendants guilty of contempt because of their failure to obey said order, and a fine of $1500 was imposed upon the Southern Pacific Company.

This action is brought to recover that fine.

II.

On July 10, 1914, Southern Pacific Company filed its
225 answer in said proceeding, raising issues both of law and of fact. Appellant demurred to the complaint because it did not state facts sufficient to constitute a cause of action, nor did it appear that the court had jurisdiction of the action.

It was averred that appellant was not afforded a fair hearing in

said proceeding but on the contrary the order was not supported by any competent or legal evidence.

Appellant further alleged that inasmuch as Campbell's United Shows was engaged in an interstate trip through the states of New Mexico, Arizona and California, the Arizona Corporation Commission had no jurisdiction, nor did it have the power to compel appellant to transport said circus as it transported such equipment as a private carrier only. It was further stated that no showing was made that the rates actually collected for the transportation of said Campbell's United Shows between Tucson and Maricopa were unjust, unreasonable or discriminatory.

Upon the issues thus framed the case was tried before the court without a jury on December 9, 1915. The state introduced
226 in evidence the record of proceedings before the Arizona Corporation Commission and then rested its case. Southern

III.

Pacific Company then introduced testimony showing that Campbell's United Shows was engaged in an interstate trip from Deming, New Mexico, to Needles, and points beyond in California, when the proceedings were instituted before the Commission. The cause was submitted to the court which subsequently, on January 5, 1916, made and signed special findings of fact and conclusions of law determining the issues in favor of the state, and thereupon on January 5, 1916, judgment was rendered and entered for the State of Arizona and against Southern Pacific Company, for the sum of $1500.

A motion for a new trial was denied January 15, 1916.

IV.

Thereupon, and within the time allowed by law, Southern Pacific Company perfected an appeal from said judgment to the Supreme Court of the State of Arizona, and thereafter, on the 19th day of May, 1917, said court, after oral and written argument by the respective parties, rendered its decision affirming the decision and order of the Superior Court of Maricopa County.

227 Thereafter, and within the time allowed by law, appellant petitioned said court for a rehearing of said cause which was denied on the 23rd day of June, 1917.

That the Supreme Court of the State of Arizona was and is the highest Court of the State of Arizona in which a decision could be had in said suit or action.

V.

In the said action, the validity of a statute of, and an authority exercised under, the State of Arizona, was drawn in question, necessarily involved and passed upon, on the ground of their being repugnant to the Constitution and laws of the United States, and the

decision was in favor of their validity. In this behalf, petitioner specifies more particularly as follows:

(A) The fine, for the recovery of which this action is brought was imposed on defendant under the provision of Section 81 of the Public Service Corporation Act of the State of Arizona (Statutes Arizona, 1912, Ch. 90) being section 2357 of the Arizona Civil Code of 1913, providing the punishment for contempt because of the failure to obey or comply with any order or decision of the Arizona Corporation Commission. It was contended by petitioner that this section operated to authorize the imposition of such enormous fines for disobedience of the Commission's orders, as virtually to close the doors of the courts to petitioner, this proposition being strengthened by the fact that under the provisions of section 67, sub (*b*) of said Act (section 2343 Arizona Civil Code), the orders and decrees of the Arizona Corporation Commission shall remain in force pending the decision of the courts upon any application made to them under the provision of said section, to review, modify, vacate or annul such order or decision, all other recourse to the courts being expressly forbidden by section 68 of said Act (Arizona Civil Code, section 2344). Your petitioner therefore asserted that the provisions of said section 81, (Arizona Civil Code, Section 2357) under which the fine was imposed, operated to deprive petitioner of the equal protection of the law, and also, deprived it of its property without due process of law contrary to the provision of section 1, of Article XIV of the Amendments to the Constitution of the United States. This question which was necessary to the decision of the case, was decided adversely to petitioner by the Supreme Court of the State of Arizona, said Court upholding the validity of said section 81 of said Act, under which the fine was imposed, and holding that it did not contravene the provisions of the Fourteenth Amendment of the Constitution of the United States.

(B) It was pleaded in the answer, and shown by the evidence introduced at the trial of the case in the Superior Court, that Campbell's United Shows, when the Arizona Corporation Commission made its order requiring the publication of a special rate for the movement of the latter from Tucson to Maricopa, both of said points being in the State of Arizona, was engaged in an interstate trip or movement through and between points in the States of New Mexico, Arizona and California; and therefore, it was beyond the power and jurisdiction of the Arizona Corporation Commission to prescribe said rate. Upon this question the trial court decided adversely to petitioner. The point was argued upon appeal, but the Supreme Court of the State of Arizona also decided it adversely to petitioner. Your petitioner aver-ed that the Supreme Court's decision, as well as that of the trial court, upheld the validity of an authority exercised under the State of Arizona, viz: The order of the Arizona Corporation Commission above referred to, the validity of which said order of the Arizona Corporation Commission was drawn in question by petitioner on the ground that it was repugnant to the provisions of Article I, Section 8 of the Constitution of the United States, delegating to Congress the power to regulate

commerce between the several states and also to the provisions of the Act of Congress known as the Act *of* Regulate Commerce, approved February 4th, 1887, as amended and supplemented by subsequent legislation. It was contended by petitioner that said order was beyond the power and jurisdiction of the Arizona Corporation Commission, in that it attempted to prescribe or fix rates for an interstate trip or movement of said Campell's United Shows, and was contrary to the provisions of the Constitution of the United States and the Act of Congress aforesaid. In order to decide this case, it was necessary for the Supreme Court to consider, pass upon and decide this point.

In the accompanying assignment of errors, your petitioner specifies more particularly wherein said order of the Arizona Cor-
231 poration Commission was repugnant to the Constitution and laws of the United States.

(C) Petitioner averred that said order of the Arizona Corporation Commission prescribing a rate for the movement of the Campbell's United Shows was void and in contravention of the provisions of the Constitution of the United States in that it was not founded upon a written complaint as required by said Public Utilities Act, nor were any of the witnesses examined at the hearing previously sworn. For the reasons mentioned, petitioner contended that said order operated to deprive it of its property without due process of law, and it denied to it the equal protection of the law contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States. The decision of the Supreme Court was adverse to the petitioner upon this question, the same being necessarily involved in the Court's decision.

VI.

The said defendant and appellant, Southern Pacific Company, being dissatisfied with the said judgment made by the Superior Court of Maricopa County, State of Arizona, in this action, and with
232 the judgment of this court affirming the same, and considering itself aggrieved thereby as will more fully appear from the assignment of errors filed herewith, respectfully prays for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Arizona and to the Justices thereof, to the end that the record in said matter may be removed into the Supreme Court of the United States and the error complained of by petitioner may be examined and corrected, and that said judgment of the Supreme Court of the State of Arizona may be reversed.

J. C. FOREST,
C. W. DURBROW,
FRANK B. AUSTIN,
Attorneys for Petitioner.

Endorsements.

Title of Court and Cause.
Petition for Writ of Error.
Copy received this 30 day of June, 1917. Wiley E. Jones, Attorney General for the State of Arizona.
Filed July 2, 1917. C. F. Leonard, Clerk Supreme Court of the State of Arizona.

233 (Title of Court and Cause.)

Assignment of Errors.

Southern Pacific Company, the above named appellant and petitioner for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Arizona, in connection with its petition for a writ of error herein avers that the Supreme Court of the State of Arizona erred in its decision and order made in the above entitled cause on the 19th day of May, 1917, and for the purpose of having the same reviewed in the Supreme Court of the United States makes the following assignment of errors:

I.

The court erred in holding that the proceedings before the Arizona Corporation Commission at the time it entered its order of March 20, 1914, were sufficient to invest the Commission with jurisdiction to make said order.

II.

234 The court erred in holding and deciding that the order of said Commission made and entered on March 20, 1914, promulgating the rate to be charged by appellant for the transportation of said Campbell's United Shows was valid, but on the contrary the court should have decided that said order was null and void.

III.

The court erred in holding that appellant because of its conduct had waived any objection to said order entered by said Commission on March 20, 1914, prescribing the rate for the transportation of Campbell's United Shows.

IV.

The court erred in holding and deciding that the failure of the Commission to have the witnesses testifying at said hearing duly sworn, and the predicating of its order upon unsworn testimony to

be a mere informality which could be waived, but on the contrary the court should have held said order to be null and void for that reason.

V.

The court erred in holding that the failure of the Commission, or any other person, to file a formal complaint before the Commission concerning the rates and practices complained of was a mere
235 informality which could be waived, but on the contrary the court should have held this to be a jurisdictional prerequisite and that the absence of such a complaint rendered the order void.

VI.

The court erred in holding that Campbell's United Shows at the time the Commission entered its said order prescribing rates for the transportation thereof was engaged in a trip between points wholly within the State of Arizona, but on the contrary the court should have held that Campbell's United Shows was then engaged in an interstate trip, that is to say, between *the* points in the State of New Mexico and points in the State of California, or between points in the State of Arizona and points in the State of California.

VII.

The court erred in holding that where the movement of said Campbell's United Shows was to be consummated under a separate and independent contract of transportation, even though it be an advance step along the general route outlined at the beginning of the trip it is an intrastate trip and the subject of state control and regula-
236 tion, but on the contrary the court should have held and decided that under such circumstances the movement was interstate in character and not subject to the jurisdiction of the Arizona Corporation Commission but subject only to the jurisdiction of the Interstate Commerce Commission.

VIII.

The court erred in holding that the movement of a circus is a mere incident to the object of its existence, namely, the giving of exhibitions, and therefore the stops which it makes are to determine primarily the character of the movement, whether intra-state or inter-state. On the contrary the court should have held that the movement of a circus, including its stops, is not the sole criterion to determine the character of the movement and the determining factor is the intention of the parties at the time the show began its tour or trip.

IX.

The court erred in holding that the order of the Commission of May 16, 1914, imposing a fine upon appellant was not void for the

reason that the statute under which the Commission acted, namely:
Sec. 2357 of the Civil Code of Arizona, was unconstitutional
237 because of the enormous fines it provides.

X.

The court erred in holding that said Section 2357 of the Arizona Civil Code was not unconstitutional and void in so far as it provided fines to be imposed by the Commission for contempt of its orders.

XI.

The court erred in holding that appellant was precluded by any stipulation or statement made at the trial of this cause in the Superior Court from questioning the validity of said order or said Section 2357 of the Civil Code of Arizona upon the ground that it was unconstitutional and void, but on the contrary the court should have held that said statute and order being void appellant did not waive any objection thereto because of any stipulation or statement made at the trial.

For the errors aforesaid your petitioner, Southern Pacific Company,
prays that the judgment of the Supreme Court of the State
238 of Arizona made and entered in the above entitled cause on the
19th day of May, 1917, be reversed and that judgment be
rendered in favor of Southern Pacific Company, and that mandate of the Supreme Court of the United States issue directing judgment in its favor.

J. C. FOREST,
C. W. DURBROW,
FRANK B. AUSTIN,
Attorneys for said Petitioners.

Endorsements.

Title of Court and Cause—No. 1529.
Assignment of Errors.
Copy received this 30 day of June, 1917. Wiley E. Jones, Attorney General for the State of Arizona.
Filed July 2, 1917. C. F. Leonard, Clerk Supreme Court of Arizona.

239 (Title of Court and Cause.)

Order Allowing Writ of Error.

The above entitled matter, coming on to be heard upon the petition of the defendant and appellant therein for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Arizona, and upon an examination of said petition and

the record in said matter, and desiring to give to the petitioner an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter,—

It is ordered that a writ of error be and is hereby allowed to this court from the Supreme Court of the United States, the writ of error to operate as a supersedeas, and a bond for that purpose is fixed at the sum of $3,000.00.

Dated at Phoenix, Arizona, this second day of July, 1917.

ALFRED FRANKLIN,
Chief Justice of the Supreme Court of the State of Arizona.

240 Endorsements.

Title of Court and Cause.—No. 1529.

Order Allowing Writ of Error.

Copy received this 2 day of July, 1917. Wiley E. Jones, Attorney General for the State of Arizona.

Copy received this 2nd day of July, 1917. Thomas E. Campbell, Governor of the State of Arizona.

Filed July 2nd, 1917. C. F. Leonard, Clerk Supreme Court of the State of Arizona.

(Title of Court and Cause.)

Bond on Writ of Error.

Know all men by these presents:

That whereas, lately in the Supreme Court of the State of Arizona in a suit pending in said court upon appeal between the State of Arizona, complainant and appellee, and Southern Pacific Company, a corporation, defendant and appellant, said Supreme Court on the 19th day of May, 1917, duly made and rendered its judgment and order affirming the judgment rendered by the Superior Court of the County of Maricopa, State of Arizona, in said action on or about the 5th day of January, 1916, in favor of said plain-

241 tiff, State of Arizona, and against said defendant, Southern Pacific Company, for the sum of Fifteen Hundred Dollars ($1,500.00), there having been no costs or disbursements incurred in the Superior Court nor the Supreme Court, and the said Southern Pacific Company, a corporation, having obtained a writ of error and filed a copy thereof in the Clerk's Office of said Supreme Court to reverse the judgment in the aforesaid suit, and a citation having issued directed to said State of Arizona citing and admonishing it to be and appear at a session of the Supreme Court of the United States to be held at the City of Washington within sixty (60) days from the date hereof,—

Now, therefore, in consideration of the premises and of such writ of error, the United States Fidelity & Guaranty Company, a corporation organized and existing under the laws of the State of Maryland,

and having its principal place of business in the City of Baltimore, in said State, being duly incorporated under the laws of the State of Maryland for the purpose of making and guaranteeing and becoming surety upon bonds or undertakings, required or authorized by law, is held and firmly bound unto the above named plain-
242 tiff and appellee, State of Arizona, in the full and just sum of Three Thousand — ($3,000.00), lawful money of the United States, to be paid the said plaintiff and appellee, State of Arizona, or its assigns, for which payment well and truly to be made the said United States Fidelity & Guaranty Company, a corporation, binds itself firmly by these presents.

The condition of the above obligation is such that if the above named defendant and appellant, Southern Pacific Company, shall prosecute said writ of error to effect and answer all damages and costs that may be awarded against it if it fails to make its said plea good then the above obligation to be void; otherwise to remain in full force and effect.

In witness whereof the said United States Fidelity & Guaranty Company, a corporation, has caused this obligation to be signed by its duly authorized attorney in fact, and its corporate seal to be hereunto affixed at Phenix Arizona this 2nd day of July,
243 one thousand nine hundred and seventeen.

UNITED STATES FIDELITY & GUARANTY COMPANY,

[SEAL.] By JOHN J. SWEENEY,
Its Attorney in Fact.

The foregoing bond is hereby approved this 2nd day of July, 1917.

ALFRED FRANKLIN,
Chief Justice of the Supreme Court of the State of Arizona.

Endorsements.

Title of Court and Cause—No. 1529.
Bond on Writ of Error.
Copy received this 2 day of July, 1917. Wiley E. Jones, Attorney General for the State of Arizona.
Copy received this 2nd day of July, 1917. Thomas E. Campbell, Governor of the State of Arizona.
Filed July 2nd, 1917. C. F. Leonard, Clerk Supreme Court of the State of Arizona.

244 (Title of Court and Cause—No. 1529.)

Præcipe for Transcript of Record.

To the Clerk of the above-entitled Court:

Will you please prepare copies of the following portions of the record in this case, and incorporate the same in the transcript of the

record, accompanying the writ of error from the Supreme Court of the United States to this Court, in the above-entitled action, to-wit:

Complaint of the State of Arizona, together with the Exhibits,
Answer of Southern Pacific Company,
Special Findings of Fact and Conclusions of Law,
Judgment,
Motion for a New Trial,
Minute Entries,
Notice of Appeal,
Bond on Appeal,
Stipulation Extending Time to File Reporter's Notes,
Notice of Filing Transcript of Reporter's Notes,
Reporter's Transcript (constituting Bill of Exceptions),
Plaintiff's Exhibit "A,"
245 Plaintiff's Exhibit "B,"
Defendant's Exhibit No. 1,
Defendant's Exhibit No. 2,
Defendant's Exhibit No. 3,
(The foregoing constituting the printed record of Abstract of Record in this Case.)
Decision and Opinion of the Supreme Court of Arizona, including dissenting Opinion of Judge Cunningham,
Petition of Southern Pacific Company for Rehearing,
Opinion of Supreme Court in Rehearing (Order denying Motion for Rehearing),
Mandate of the Supreme Court (No Mandate sent down), and
All other papers in this case.

Dated July 2nd, 1917.

C. W. DURBROW,
J. C. FOREST
FRANK B. AUSTIN,
Attorneys for Defendant and Appellant.

246 Endorsements.

Title of Court and Cause—No. 1529.
Praecipe for Transcript of Record.
Copy received this 2nd day of July, 1917. Wiley E. Jones—K., Attorney General for the State of Arizona.
Copy received this 2nd day of July, 1917. Thomas E. Campbell, Governor of Arizona.
Filed July 3, 1917. C. F. Leonard, Clerk Supreme Court.

247 In the Supreme Court of the State of Arizona.

Clerk's Certificate.

SUPREME COURT,
State of Arizona, ss:

I, C. F. Leonard, Clerk of the Supreme Court of the State of Arizona, do hereby certify that the foregoing pages, numbered from 1

o 246, inclusive, contain a full, true and complete transcript of the Complaint of the State of Arizona, together with exhibits thereto attached, Answer of Southern Pacific Company, Special Findings of Fact and Conclusions of Law, Judgment, Motion for New Trial, Minute Entries, Notice of Appeal, Bond on Appeal, Stipulation extending time to file reporter's transcript, Notice of filing reporter's transcript of testimony as bill of exceptions, Reporter's Transcript, Plaintiff's Exhibit A, Plaintiff's Exhibit B, Defendant's Exhibit I, Defendant's Exhibit II, Defendant's Exhibit III, Decision and Opinion of Supreme Court of Arizona, Petition for Rehearing, Order denying Rehearing, Petition for Writ of Error, Order allowing
248 Writ of Error and Fixing Bond, Prayer for Reversal, Assignment of Errors, Bond, and Praecipe for Record.

And I further certify that the attached Writ of Error, and Citation on Writ of Error are the originals issued by said Supreme Court in said above entitled cause.

In witness whereof, I have hereunto subscribed my name and affixed the seal of the Supreme Court of the State of Arizona, at Phenix, this 23rd day of July, 1917.

[Seal Supreme Court, State of Arizona.]

C. F. LEONARD,
Clerk of the Supreme Court
of the State of Arizona.

249 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable Justices of the Supreme Court of the State of Arizona, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment which is in the Supreme Court of the State of Arizona before you, being the highest court of law or equity of the said state in which a decision could be had in a suit between Southern Pacific Company, a corporation, defendant and appellant, and the State of Arizona, complainant and appellee, decided by you on the 19th day of May, 1917, and wherein was drawn in question the validity of a statute of and an authority exercised under said State of Arizona on the ground of their being repugnant to the Constitution and Laws of the United States, and the decision was in favor of their validity; a manifest error has happened to the great damage of the said Southern Pacific Company as by the petition for writ of error and the record in said matter fully appears.

We, being willing that error, if any has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same,

250 to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, D. C., within sixty (60) days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States this 2nd day of July, 1917.

[Seal United States District Court, District of Arizona.]

MOSE DRACHMAN, *Clerk*,
By R. E. L. WEBB,
Deputy Clerk of the United States District Court for the District of Arizona.

Allowed on July 2nd, 1917, by

ALFRED FRANKLIN,
Chief Justice of the Supreme Court of the State of Arizona.

251 [Endorsed.] No. 1529. In the Supreme Court of the United States.

Southern Pacific Company, a Corporation, Plaintiff in Error, vs. State of Arizona, Defendant in Error.

Writ of Error.

Copy received this 2nd day of July, 1917. Wiley E. Jones, Attorney General of the State of Arizona.

Copy received this 2nd day of July, 1917. Thomas E. Campbell, Governor of the State of Arizona.

Filed Jul- 2, 1917. C. F. Leonard, Clerk Supreme Court.

252 *Citation on Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the State of Arizona, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States, at Washington, D. C., within sixty (60) days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Arizona, wherein Southern Pacific Company, a corporation, is plaintiff in error, and you, the said State of Arizona, are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Chief Justice of the Supreme Court of the State of Arizona, this 2nd day of July, 1917.

ALFRED FRANKLIN,
Chief Justice of the Supreme Court of the State of Arizona.

Attest:

[Seal Supreme Court, State of Arizona.]

C. F. LEONARD,
Clerk of the Supreme Court of the State of Arizona.

253 [Endorsed:] No. 1529. In the Supreme Court of the United States.

Southern Pacific Company, a Corporation, Plaintiff in Error, vs. State of Arizona, Defendant in Error.

Citation on Writ of Error.

Copy received this 2 day of July, 1917. Wiley E. Jones, Attorney General for the State of Arizona.

Copy received this 2nd day of July, 1917. Thomas E. Campbell, Governor of the State of Arizona.

Filed Jul- 2, 1917. C. F. Leonard, Clerk Supreme Court of State of Arizona.

254 In the Supreme Court of the State of Arizona.

No. 1529.

SOUTHERN PACIFIC COMPANY, a Corporation, Appellant,

vs.

STATE OF ARIZONA, Appellee.

Oral Judgment and Minute Entry.

This cause having been heretofore submitted and by the Court taken under advisement, and the Court having considered the same and being fully advised in the premises:

At this day it is ordered, that the judgment of the lower court in this cause be and the same is hereby affirmed.

It is further ordered, adjudged and decreed, that the State of Arizona, appellee herein, do have and recover of and from the Southern Pacific Company, a corporation, appellant herein, and Clinton Campbell and Edward Eisele, sureties on appeal and supersedeas bond herein, the principal sum of Fifteen — ($1500.00)

255 Dollars, with interest thereon at the rate of six (6%) per cent per annum from the 9th day of December, 1915, until paid, and their costs in this court taxed at — Dollars, together with its costs in the lower court in this cause incurred.

(Entered May 19th, 1917.)

SUPREME COURT,
State of Arizona, ss:

I, C. F. Leonard, Clerk of the Supreme Court of the State of Arizona, do hereby certify the foregoing to be a full, true and correct copy of the minute entry and oral judgment entered by said Supreme Court on the 19th day of May, A. D. 1917, in the said above entitled cause.

In witness whereof, I have hereunto set my hand and affixed the seal of the said Supreme Court, at the City of Phœnix, this 16th day of August, A. D. 1917.

[Seal Supreme Court, State of Arizona.]

C. F. LEONARD,
Clerk of the Supreme Court
of the State of Arizona.
By MABELLE GRAVES,
Deputy Clerk of the Supreme Court
of the State of Arizona.

256 [Endorsed:] File No. 26,083. Supreme Court U. S., October Term, 1917.
Term No. 616.
Southern Pacific Company, Pl'ff in Error, vs. State of Arizona.
Certified copy of judgment of Supreme Court of Arizona.
Filed August 21, 1917.

Endorsed on cover: File No. 26,083. Arizona Supreme Court. Term No. 616. Southern Pacific Company, plaintiff in error, vs. The State of Arizona. Filed August 13th, 1917. File No. 26,083.

Office Supreme Court, U. S.
FILED
FEB 13 1919
JAMES D. MAHER,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1918

No. 238.

(October Term, 1917, No. 616)

SOUTHERN PACIFIC COMPANY,
Plaintiff in Error,
vs.
THE STATE OF ARIZONA.

BRIEF OF PLAINTIFF IN ERROR.

In Error to the Supreme Court of the State of Arizona.

C. W. DURBROW,
HENLEY C. BOOTH,
Solicitors for Plaintiff in Error,
65 Market Street, San Francisco, Cal.

WM. F. HERRIN,
Of Counsel,
65 Market Street, San Francisco, Cal.

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Supreme Court of the United States

OCTOBER TERM, 1918

No. 238.

(October Term, 1917, No. 616)

SOUTHERN PACIFIC COMPANY,
Plaintiff in Error,
vs.
THE STATE OF ARIZONA.

BRIEF OF PLAINTIFF IN ERROR.

In Error to the Supreme Court of the State of Arizona.

STATEMENT OF THE CASE.

The Supreme Court of the State of Arizona (Opinion; Record pp. 71-86; reported as *State of Arizona* vs. *Southern Pacific Company*, 165 Pacific Reporter, 303) by a majority opinion affirmed a judgment of the Superior Court of Maricopa County, Arizona, (Record, pp. 23-24) against the Southern Pacific Company for $1500.00, the amount of a fine assessed by the Commission for failure to obey one of its orders. The Supreme Court, following Arizona practice, gave judgment for the same amount against the appellant Southern Pacific Company and its bondsmen (Record, p. 103).

The foundation of the claim of the State of Arizona against the Southern Pacific Company for $1500.00 is an order of the Arizona Corporation Commission requiring it to transport the cars, property, employes and attendants of Campbell's United Shows from Tucson, Arizona, to Maricopa, Arizona, and also requiring the Arizona Eastern Railway Company to transport the same equipment and personnel from Maricopa, Arizona, to Phoenix, Arizona, at a rate for the entire movement on both railroads not to exceed $3.00 per mile.

The Southern Pacific Company declined to comply with the order, whereupon the Commission on contempt proceedings assessed a fine of $1500.00 against it, which, under the Arizona Public Service Corporation Act, was collectible, if at all, by suit in a *nisi prius* court, in this case the Superior Court of Maricopa County, Arizona, in which court testimony was required to be and was introduced and from which court an appeal laid to the Supreme Court of the State of Arizona.

The Superior Court gave judgment for the $1500.00 fine. The Supreme Court, by a divided court, affirmed that judgment. A writ of error was sued out therefrom to this Court.

Hereinafter we will more fully state the facts, which are undisputed, and will refer to the record.

Before doing so we desire to state briefly the two issues of law we rely upon:

First. The Arizona Corporation Commission had no

jurisdiction to make the order upon which the fine was based because the movement of Campbell's United Shows by the railroads covered by the order was a movement in interstate commerce over which the Arizona Corporation Commission had no authority or jurisdiction; and,

Second. The Arizona Corporation Commission unlawfully endeavored by its order to regulate the Southern Pacific Company in respect to its right to make or refuse to make a contract as a private carrier for the transportation of circuses and like traveling shows and in so doing attempted to deprive the Southern Pacific Company of the equal protection of the law and by the order, as well as by the fine, to take its property without due process of law.

There are four lines of railroad referred to in the testimony and involved in the consideration of the validity of the Commission's order. The El Paso & Southwestern System has a line running from El Paso, Texas, through Deming, New Mexico, ending at Tucson, Arizona, and there having track connections with the line of the Southern Pacific Company, which runs from El Paso, Texas, through Deming, New Mexico, and through Tucson, Arizona, and Maricopa, Arizona, and thence westward into California. The Atchison, Topeka & Santa Fe Railway Company has a line of railroad substantially parallel with the Southern Pacific line running through New Mexico and Arizona into California, and distant about 150 miles north of the Southern Pacific line. At Maricopa, Arizona, the Arizona Eastern Railroad Company, a separate corporate entity from the other railroads just referred to, has a line of railroad extending northerly from the Southern Pacific line to Phoenix, which lies between the Southern Pacific and the Santa

Fe lines. From Phoenix the Santa Fe has a line of railroad running northerly through Prescott to Ash Fork, there being at Phoenix track connections by which cars may be switched from the Arizona Eastern to the Santa Fe line and it thus being possible for a circus or like organization to leave El Paso on either the El Paso & Southwestern or the Southern Pacific, to show at Tucson, and to proceed thence on the Southern Pacific to Maricopa, thence on the Arizona Eastern to Phoenix and to show there, and thence on the Santa Fe line northerly to Ash Fork and westerly to California, which is precisely what, as we shall show, was the route of Campbell's United Shows, actually contemplated by them when they left Texas and actually traversed by them in a continuous interstate journey from Texas to California, via Phoenix, broken only by transfer from one railroad to another and by the desired stops for exhibition purposes.

The Arizona Corporation Commission derives its powers and functions from Article 15 of the Arizona Constitution and from Chapter 90 of the Arizona Laws of 1912, reprinted as Chapter II, Title 9, of the Arizona Civil Code of 1913, and known as the "Public Service Corporation Act." The sections of the Constitution and of the Act which were thought by the Arizona Supreme Court to be in point are synopsized in the majority opinion by that Court (Record, pp. 81-82) and for greater convenience are printed as an Appendix to this brief. It may be sufficient in passing to say that the Commission is given by that Act as

broad and general powers with respect to the regulation of railroad *common carriers* as are given by any of the Railroad Commission or Public Service Acts of the various states which have ever been the subject of consideration by this Court.

The proceedings before the Arizona Corporation Commission up to the time of the first hearing before it and which resulted in its order to give the special rate or contract to Campbell's United Shows are stated with substantial accuracy in the recital of facts in its opinion and order beginning at page 55 of the record and reading:

> "The management of Campbell's United Shows complained informally, March 7, 1914, that the Southern Pacific Company and the Arizona Eastern Railroad Company declined to transport the cars, equipment and employees of complainant from Tucson, Arizona, to Phoenix, Arizona, whereupon the Commission, by telegraph, requested the Arizona Eastern R. R. Co. to advise upon what authority they declined to enter into a contract with Campbell's United Shows, to which reply was made as follows:
>
> 'We have not declined to enter into a contract for movement Campbell Shows. Traffic Manager who handles all circus contracts and movements on S. P. was telephoned yesterday for terms and contract to cover movement to Maricopa and Williams was so advised before he left here. Also say that Arizona Eastern will make contract as soon as arrangements are made for movement to Junction.'
>
> General Agent E. L. Williams of the Campbell Shows again complained to the Commission on March 18, 1914, that the above-named carriers

still declined to make a contract or agreement at the usual circus rates, for the transportation of this show from Tucson to Phoenix. The Commission again wired the Arizona Eastern as follows:

'Williams, General Agent, Campbell's Shows, complains that your company declines to make contract at customary circus movement rates for Campbell shows, Tucson to Phoenix. Please advise by wire today reasons for discrimination.'

to which telegram General Freight Agent E. W. Clapp of the Arizona Eastern replied as follows:

'Tucson, Ariz.,
Mar. 19, 1914.

'Arizona Corporation Commission, Phoenix:

'As private carrier it is not our practice to enter into contract with two circuses moving over line less than thirty days apart except upon mutual understanding between the circuses. Williams is familiar with this practice and Campbell has heretofore insisted on our following it. The Commission will appreciate reasonableness of this rule when applied to circuses and like organizations.'

Under date of March 18, 1914, the Commission was advised by Mr. Clapp as follows:

'Mr. Lace (NOTE.—Freight Traffic Manager, Southern Pacific Co.) requests that I say Southern Pacific has never held itself out as common carrier of circus or kindred shows and such movements are subject to special contracts executed by Southern Pacific on its part as private carriers. Our counsel advises that no Federal or State Commissions have been vested with power to regulate movements. Regret that we cannot lawfully or consistently depart from our general policy in this instance.'

The Commission wired Mr. Clapp, under date of March 19, 1914, as follows:

'Please advise reason for moving Sells Floto under reduced contract rate and demanding full tariff rate for movement Campbell's Shows by Arizona Eastern and Southern Pacific. See Section 19, Chapter 90, Session Laws, First Legislature, State of Arizona.'

The carriers having denied the jurisdiction of the Commission with respect to transportation of certain classes of freight within the State, and having declined to prove rates that, in the opinion of the Commission are just, reasonable and non-discriminatory, an order was issued commanding the Southern Pacific Company and Arizona Eastern Railroad Company to appear before the Commission on March 23, 1914, and show cause why this Commission should not issue a special order as follows:

'Special Rate Authority No. —.

'In consideration of the facts shown, the Southern Pacific Company and the Arizona Eastern Railroad Company are hereby ordered to publish on one day's notice the following rate for the transportation of Campbell's United Shows, consisting of eighteen (18) cars, and to furnish such equipment as may be necessary, within the State of Arizona:

'Tucson, Arizona, to Maricopa, Arizona, $3.00 per mile.

'Maricopa, Arizona, to Phoenix, Arizona, $3.00 per mile.'

The matter came on for hearing at 10 o'clock a. m., Monday, March 23, 1914, in the office of the Commission, at which time and place, V. O. Baker, Attorney; E. W. Clapp, General Freight Agent, and A. G. Hallmark, Assistant General Freight Agent, appeared for the respondent car-

riers, and E. L. Williams for Campbell's United Shows. General Freight Agent J. G. Stubbs of the Southern Pacific Company was present."

Thereupon Williams, the agent for Campbell's United Shows, made an unsworn statement before the Commission, which begins at page 63 of the record and the material portions of which are as follows (italics ours):

"CHAIRMAN GEARY. Ready to proceed.

Mr. BROWN. I don't think there have been any steps taken in this matter at all except Mr. Campbell through his representative, Mr. Williams, complained that the E. P. & S. W. had hauled him to Tucson and that the Southern Pacific and Arizona Eastern declined to haul him from Tucson to Phoenix for less than the tariff rates, although they were carrying rates for other shows. It was on Mr. Williams' complaint that the hearing originated. Mr. Williams is here.

Mr. WILLIAMS. On or about February 14th, I called on Mr. McCann, at El Paso, representative of the Southern Pacific and *asked for a rate and contract* from El Paso over the Southern Pacific to Bowie and up to Miami and Globe and down to Cochise where the Southwestern would take me into Tucson and then from Tucson to Maricopa. Mr. McCann said he would take it up and I waited two days and he said he could not get word; then *I made my contracts* through to Tucson and called on Mr. Hallmark and asked for a *contract* and he said he would take it up at once and I came over here (Phoenix) and spent two or three days and then went back to Tucson and Mr. Hallmark said he hadn't heard anything from San Francisco and a day or so later I went back again and he stated that the

Sells-Floto had a thirty-day clause over me and that he could not move me. I went to Mr. Mustain, of the E. P. & S. W. and asked him if he ever heard of a thirty-day clause and what he thought about it and he called up Mr. Hallmark on the phone and Mr. Hallmark told him that that was an agreement of the western roads and that they could not move me; I went back to El Paso and then returned to Tucson and saw Mr. Hallmark and he said they had been notified not to make a contract as a common carrier with me, and I said what am I to do then, if you can show me any place to go I will do so, and he suggested Nogales. Well, Nogales is 60 miles down and it was impossible for me to go there and I said I will go to Ray, and he said, No, you will interfere with Floto's excursion rate, and I said, what can I do? and he said, I don't know, and I said I will complain to the Commission: I came up here and you wired Mr. Hallmark and he wired back that he would make a contract with me, but when I went back two days later, he said he could not make a contract: in the meantime I saw Mr. Booshee, of Sells-Floto show, and asked him, will you release that clause (NOTE.—*Meaning a clause in the Sells-Floto circus contract made with the railroad as a private carrier, providing a thirty-day space between it and other shows similarly moved*); it is either that or I will have to close my show at Tucson, and Mr. Booshee said, what do you think I put that clause in for, and then I came out here and we looked over the *tariff* and found no thirty-day clause, and when I went to Mr. Hallmark, he said he would move me under the tariff which amounted to $90.00 a car, $1400.00, and then I would have to buy tickets for 100 or 110 people.

* * *

CHAIRMAN GEARY. How many cars have you?

Mr. WILLIAMS. I have eighteen; five of my

own and I get eight flats from the company and four box cars.

CHAIRMAN GEARY. What are you showing?

Mr. WILLIAMS. I have a carnival show.

Mr. JONES. What rate do you ordinarily get?

Mr. WILLIAMS. Over the Southwestern they gave me *a rate for a special move of $3.50 and where they throw me into their regular service, that is, fill up my train with other cars*, they charge me $3.00.

Mr. JONES. A mile?

Mr. WILLIAMS. Yes sir, for the outfit and men. And my rate last year with the Arizona Eastern; I haven't my Southern Pacific *contract*, but with the Arizona Eastern it was $185 to move my train from Tucson to Mesa and from Mesa here, which is about fifteen miles difference. This year Mr. Hallmark said he thought they could move us for $200 the same way because I had one extra car, and suggested that before he declined to give me *a contract; from the Southern Pacific I have never had any word except they would not make a contract*; they said they would wire San Francisco and see what they would do, but I have never had a satisfactory answer.

Mr. JONES. The reason they gave was they had to move another circus?

Mr. WILLIAMS. They never gave any reason except it interfered with Floto (NOTE.—*Meaning the Sells-Floto circus*) and in going to Ray I interfered with their excursion rate; Mr. Hallmark suggested that to me and also Mr. Booshee.

Mr. JONES. You are in Tucson now?

Mr. WILLIAMS. *I am there this morning and*

want to leave there on the twenty-ninth, next Sunday.

Mr. BROWN. You had a *contract* with the Southwestern?

Mr. WILLIAMS. I have a *contract* for 100 miles from Douglas to Bisbee and my *contract* from Bisbee to Tucson is 300 miles, carrying my people and all cars.

Mr. BROWN. Two dollars and eighty cents for eighteen cars?

Mr. WILLIAMS. They furnish me what cars I want while on their line; *the Santa Fe gave me about the same rate last year; I haven't asked them this year for a contract yet.*

Mr. BAKER. What do you have in your show, animals?

Mr. WILLIAMS. Small animals.

Mr. BAKER. Mostly acrobats?

Mr. WILLIAMS. I have no acrobats at all; I have hand-balancing, have a merry-go-round, Ferris Wheel and Motordrome.

CHAIRMAN GEARY. Have a bunch of freaks?

Mr. WILLIAMS. Yes.

Mr. BAKER. How many side shows have you?

Mr. WILLIAMS. We don't class them as side shows; I don't get a license for side shows.

Mr. BROWN. Does your El Paso and Southwestern *contract* include transportation for your advance agent and bill posters?

Mr. WILLIAMS. Yes sir, they issue me 20 per cent of my mileage for myself and agents, and I asked the Southern Pacific and Arizona Eastern, explained it to Mr. Hallmark that I wanted the *contract* signed so I could get my men out;

as it is I have paid regular fare back and forth, Mr. Campbell has done the same and I asked Mr. Hallmark if he would refund that and he said, No, he didn't think so. I have receipts for the fares I bought; I never had trouble with any other road except the Southern Pacific; I have traveled almost every road in the country and got the best service, but every time I get to Tucson I can not get over the Southern Pacific and Arizona Eastern without trouble.

Mr. BROWN. *Where do you propose to go from here?*

Mr. WILLIAMS. *From here to Prescott, Clarkdale and Kingman and from Kingman to Needles and then into California.*

Mr. BROWN. *What rates have you on the Santa Fe?*

Mr. WILLIAMS. I can not tell you yet; *I have put in my application for a contract;* I have a copy of my contract with them last year, which was very low, about the same as the Southwestern.

Mr. BROWN. Your contract last year was to Prescott from here, and Prescott to Needles, and they charged you about $3.00 per mile?

Mr. WILLIAMS. Yes sir.

Mr. BROWN. Did they furnish you any additional cars?

Mr. WILLIAMS. All I asked for and mileage.

Mr. JONES. That is passenger transportation?

Mr. WILLIAMS. Yes, that is to get the agents over the road, myself and bill poster, advertising men.

Mr. BAKER. How many people in your show?

Mr. WILLIAMS. About 100.

Mr. JONES. The correspondence we had with the traffic people with the railroads indicated that they took the position that they were not common carriers for a circus, is that the position of the Southern Pacific?

Mr. BAKER. Yes sir; we wish to take the position we are not common carriers for circuses and carnivals; we want that in the record."

That, if it can be called testimony, was the only testimony taken before the Commission, and we respectfully submit, even without reference to the uncontradicted testimony taken before the Superior Court, from which we shall presently quote, clearly shows that Campbell's United Shows were in the course of a journey from Texas to California, continuous in character and unbroken, except for the necessary transfer from one railroad to another and the necessary stops for their exhibition purposes.

Following the hearing in question the Commission entered its opinion and order (Record pp. 55-60) the operative portion of which is (Record p. 60) (italics ours):

"It is therefore ordered:

That the Southern Pacific Company and Arizona Eastern Railroad Company transport the *cars, property, employees and attendants* of Campbell's United Shows from Tucson, Arizona, via Maricopa, to Phoenix, Arizona, and *to extend* to the said Campbell's United Shows the *usual privileges* in the movement of advance agents, for a total amount not to exceed $3.00 per train mile for the entire service.

It is understood that the shipment will consist

of not to exceed four coaches, four large box cars and ten flat cars, and it is further understood that the Southern Pacific Company and Arizona Eastern Railroad Company *may enter into a contract* covering this transportation, *the terms of which* shall not be in substantial variance with *the contract now existing* between the Arizona Eastern Railroad Company and Sells Floto Shows Company, *with respect to details as to responsibility, service and conditions*, copy of said contract being on file with the Commission, and made on March 4, 1914, by and between the Arizona Eastern Railroad Company and Sells Floto Shows Company. It is further ordered that, upon submission of evidence that any charge or charges have been exacted by respondent companies for transportation of advance agents or employees, *at variance with contract herein referred to*, made by respondent, Arizona Eastern Railroad Company with Sells Floto Shows Company, that the amount or amounts so collected shall be refunded to Campbell's United Shows."

It will be observed that no tariffs are required to be filed but that the entire order is upon the basis of a contract for private carriage.

The Southern Pacific Company moved for a rehearing which was denied (Record p. 53) and it and the Arizona Eastern declined to make the contract or haul on the terms required by the Commission's order, whereupon they were, on petition of the Attorney General, cited for contempt (Record p. 51), on the hearing of which citation the Commission entered its order (Record pp. 47-50) fining the South-

ern Pacific Company $1500 for contempt and directing the Attorney General to proceed to collect as provided by law.

On its failure to pay said fine the Attorney General sued the Southern Pacific Company in the Superior Court of Maricopa County by complaint filed therein (Record pp. 1-3) attached to which were copies of the orders of the Commission hereinbefore referred to. Findings and conclusions of law were made by the Superior Court (Record pp. 19-23) and thereon a judgment was entered on December 9, 1915, that the State of Arizona recover $1500 (Record pp. 23-24).

The action was brought under the provisions of Section 2356 of the Arizona Corporation Commission Law (see Appendix hereto) providing that when a fine is assessed for contempt of the Commission it must be recovered before a court of the state, the procedure being the same as in courts of record of the state. On the trial of the action in the Superior Court (Trial Proceedings, Record pp. 31-41) the inquiry was *de novo* on the question of whether the Commission had jurisdiction to make the order upon which the contempt proceedings were founded.

The Attorney General first introduced the proceedings before the Commission together with the transcript of the reporter's minutes of the hearing of March 23, 1914 (Record pp. 31-32). The colloquy among the trial judge, the deputy attorney general

and Mr. Durbrow, counsel for the Southern Pacific Company, is shown on pages 33, 34 and 35 of the record, from which it appears that it was well understood that the question being tried was not whether the contempt proceedings were regular in form, but whether the order of the Commission upon which they were based was in excess of the authority of the Commission.

The plaintiff, the State of Arizona, having introduced all of the proceedings before the Commission, including the testimony or statement of the witness Williams taken before it prior to the entry of the original order, the defendant Southern Pacific Company introduced the tariffs of the Arizona Eastern Railway Company and the Southern Pacific Company (Record p. 35) on the tariff rates shown by which it was conceded that Campbell's United Shows were transported from Tucson to Maricopa over the Southern Pacific line, and from Maricopa to Phoenix over the Arizona Eastern line. Facsimiles of these tariffs appear in the record following page 70.

These tariffs were filed with and bore serial numbers of both the Arizona and the Interstate Commerce Commission. None of these tariffs provides for the movement of a circus or like outfit on special or private contract; none of the tariff provisions hold the Southern Pacific Company out to be a common carrier of circuses or like enterprises. All of them are ordinary commercial tariffs for the movement of theatrical and other passenger parties and private cars.

In addition to introducing these tariffs the defendant Southern Pacific Company called three witnesses. W. S. Goldsworthy (Record pp. 35-36) testified that Campbell's United Shows applied to him as General Agent of the Santa Fe at Phoenix on March 20, 1914, for a special private carrier contract from Phoenix through Prescott, Clarkdale and Kingman, Arizona, to Needles, California.

The next witness, Charles K. Adams (Record pp. 37-38) Chief Clerk to the General Freight Agent of the Santa Fe, Los Angeles, testified that on March 21, 1914, he was asked by Mr. Goldsworthy for a contract rate for Campbell's United Shows from Phoenix to Prescott to Clarkdale to Kingman and to Needles, California, and that subsequently he also quoted rates on the Santa Fe from Needles, California, to Bakersfield, California, and on up the San Joaquin Valley.

The special contract of the Santa Fe from Phoenix, Arizona, to Needles, California, is reproduced in facsimile as defendant's Exhibit No. 2 in the record immediately following the tariffs last referred to.

The special contract of the Santa Fe from Prescott, Arizona, to Bakersfield, California, is shown in facsimile as defendant's Exhibit No. 3 immediately following defendant's Exhibit No. 2. Both of these contracts are of the familiar type of "circus contracts" made by railroads as private carriers.

The witness H. C. Hallmark, General Freight and

Passenger Agent of the Arizona Eastern, and Assistant Freight and Passenger Agent of the Southern Pacific Company, was then called, his testimony being shown on pages 38 to 41 of the record. He testified (Record pp. 38-39):

"Q. Did you have anything to do with negotiating any contract or quoting any rates to Campbell's United Shows during March and April, 1914?

A. Yes, sir.

Q. And please state when you first met any representative of that organization?

A. We had negotiations early in February through representatives of the Southern Pacific Company at El Paso. I met Mr. E. L. Williams, General Agent of Campbell's United Shows, about March 6th, 1914.

Q. Did he ask you for a rate?

A. He asked for a rate at that time between Tucson and Phoenix, with a probable movement to other points in Arizona and California, at that time explaining that they were coming from Deming, New Mexico, into Tucson over the El Paso and Southwestern.

Q. That is, at the time he asked you for a rate and asked you to move his show, his carnival company was at Deming, New Mexico?

A. Yes, sir, and it subsequently moved into Tucson and thence into Phoenix.

Q. At what rate did the carnival move from Tucson into Phoenix, Arizona?

A. At a passenger rate of $4.85 per capita.

* * *

Q. Those fares were charged under the tar-

iffs that were on file at that time with the Interstate Commerce Commission and which have been introduced in evidence here?

A. They were.

Q. What character of show is this?

A. It is a carnival outfit and the rate applying to carnivals was charged this show."

He further testified that at the time the Arizona Corporation Commission's order was entered the Arizona Eastern had a contract with the Sells-Floto Circus and that while it had always transported circuses under special contracts it was not at that time transporting carnival shows on special contracts.

There was no further testimony taken and judgment was entered against Southern Pacific Company for $1500 (Record, p. 23-24), from which an appeal was taken to the Arizona Supreme Court (Record, pp. 28-29), which Court, as shown by its opinion, beginning at page 71 of the record, considered all of the evidence taken before the Commission as well as before the Superior Court in determining (Record, p. 75)

> "whether the Corporation Commission had jurisdiction to make its order; whether the movement of Campbell's United Shows was an interstate transaction and therefore not within the jurisdiction of the State Corporation Commission; also whether the Corporation Commission had jurisdiction to make its order requiring appellant to enter into a special contract as a private carrier for the transportation of the privately owned equipment of Campbell's United Shows."

Mr. Justice Ross, with whom concurred Mr. Chief Justice Franklin, held against the defendant on both points. Mr. Justice Cunningham (Record, p. 83) dissented in an opinion to which we shall hereinafter refer.

It is respectfully submitted that upon the whole record wherein the evidence is without dispute it is conclusively shown that Campbell's United Shows at all times covered by the record were in the course of a journey from Texas to California, said journey being continuous, except for the breaks therein necessitated by transfer from one railroad to another and by stopping at various points to produce their shows; that it was at no time the intention of said Campbell's United Shows from the time they left El Paso to end their journey at any point short of California and that their movement between Tucson and Phoenix, Arizona, was merely a part of an interstate journey which was at all times intended by them and was actually made by them.

We shall argue therefrom that the State Commission, no matter what the provisions of its organic Act may be, had no jurisdiction to establish a rate for the transportation of those shows from Tucson to Phoenix, either by coercing and compelling the railroad carriers to execute a special private contract at a fixed rate per mile for the entire movement, or by establishing a rate for that movement in common carriage.

We further respectfully submit that the evidence shows that the railroad company at no time held itself out as willing to make a contract as a private carrier with Campbell's United Shows for the movement involved and that the effect of the Commission's order was to compel it to make such contract under penalty of punishment for contempt, thereby exceeding the jurisdiction of said Commission and depriving said railroad of its right to contract privately and of its proven, lawful tariff rates as a common carrier for the movement in question, whereby said railroad was denied the equal protection of the law and had its property taken without due process of law.

SPECIFICATION OF ERRORS RELIED UPON.

The assignments of error which were duly presented and filed are shown at pages 95 to 97 of the record.

The plaintiff in error hereby specifies that the Supreme Court of Arizona erred in the following particulars:

First. It erred in holding and deciding (Record, p. 82):

> "We think it was the intention of the law, both constitutional and statutory, that the Corporation Commission should have plenary power over every public service corporation transacting business in this state of a local nature. That this power of supervision extends to contracts for the transportation of both persons and property, whether effected in the capacity of private carrier or common or public carrier. Nor do we think that appellant can complain because it had neglected to file with the Commission tariffs showing the rates for the movement of privately owned equipment of circuses and like organizations. These omissions may be excused, as stated by the Interstate Commerce Commission in its rules concerning circuses and other show outfits, owing to 'the peculiar nature of this traffic and the difficulties of establishing rates thereon in advance of shipper's request describing the character and volume of the traffic offered,' but it cannot justify a refusal upon application to fix just and reasonable rates or to enter into just and reasonable contracts."

Second. It erred in holding and deciding (Record, p. 80):

> "Looking to our statutes and to our Constitution, we are satisfied that the common law rule has been abrogated in this State so as to make it obligatory upon common carriers to accept and transport the privately owned equipment of circuses and other show outfits under the rules, regulations and rates, when reasonable and just, prescribed by the Corporation Commission."

in that to compel a common carrier to make a contract for the private carriage of persons and property transcends the police power of the state and where, as in the case at bar, the common carrier is unwilling to make such private contract but is willing to transport such persons and property as a common carrier at lawful tariff rates which exceed the rates attempted to be fixed for it as a private carrier, its property is taken without due process of law and it is deprived of the equal protection of the law.

Third. The Court erred in holding and deciding that the movement of Campbell's United Shows from Tucson, Arizona, to Phoenix, Arizona, was not an integral part of a continuous interstate transportation, but was merely a local movement, separate and distinct from the route laid out by the show when it left El Paso and therefore governable by the Arizona Corporation Commission, instead of by the interstate tariffs, facsimiles of which are shown as Exhibits 1 and 2, beginning at page 70 of the record.

Fourth. The Court erred in holding and deciding

that the movement of Campbell's United Shows in Arizona was not part of an interstate movement, but was divisible into a number of intrastate movements between stations in Arizona where it desired to stop for the purpose of producing its shows.

Fifth. The Court erred in denying a re-hearing (Record, p. 90) on the grounds urged (Record, p. 88):

> "(1) That the record clearly shows that it was intended by the shipper before the shipment left its point of origin (El Paso), that the shipment would move from Texas through the states of New Mexico and Arizona and onward into the State of California.
>
> That as a matter of fact the shipment did move in accordance with the shipper's original intention from its point of origin in the State of Texas through the states of New Mexico and Arizona and onward into the State of California.
>
> It is further respectfully represented by this petition that in deciding as the Court did, that the movement in question was one in intrastate commerce and not in interstate commerce, this Court based its opinion in that respect solely on the four cases cited in the opinion, and failed to give proper and controlling weight to the provisions of the Federal Constitution and Statutes, and to the decisions of the Federal Courts interpreting and applying such Constitution and Statutes which solely govern this case."

Sixth. The Court erred in affirming the judgment of the Superior Court and under the Arizona practice entering judgment in favor of the State of Arizona and against the plaintiff in error in the sum of $1500 and costs.

BRIEF OF THE ARGUMENT.

I.

The Arizona Corporation Commission had no jurisdiction to make the order upon which the claim was predicated because the movement of Campbell's United Shows by the railroads covered by the order was a movement in interstate commerce over which the Arizona Corporation Commission had no authority or jurisdiction.

It is said by the learned justice and chief justice of the Arizona Supreme Court, who concurred in the majority opinion:

> "Of course, if the movement of Campbell's United Shows from Tucson to Phoenix was an interstate movement, the order of the Commission was void for want of jurisdiction over the subject matter" (Record, p. 76).

The Court then, after conceding that the show left Texas with the object of making a continuous trip to California, stopping en route for exhibitions, on page 77 of the record likens the movements of the show to those

> "of a sightseer in going from one state into another on a common carrier" and "having arrived in a state the show or traveler in 'doing' the state could not claim or demand a schedule rate for interstate transportation, but must pay at the local or intrastate rate as long as the movement is from one stop in the state to another stop in the state."

Thereupon the majority opinion holds that the decision of this Court in *Gulf, Colorado & Santa Fe Railway Co.* vs. *Texas*, 204 U. S. 403, is controlling.

The minority opinion holds, after discussing the evidence (Record, p. 85):

> "The evidence is therefore without conflict that the starting place of this organization of shows was Deming in the State of New Mexico, and its stopping place was within the State of California. The exact point in contemplation is left in doubt by the evidence, but that the route for the journey determined upon in advance of starting from Deming, New Mexico, was through Arizona to Needles in the State of California with the expectation of frequent stops incidentally along the course of the proposed journey, is clearly shown. The transportation companies were informed of the proposed route of travel from the place of beginning to its termination at Needles, California, at least. The proposed incidental stopping places were not disclosed, nor, perhaps, fully determined upon. That the shows would stop at Tucson and at Phoenix, however, was definitely determined, of which stops the transportation companies involved had information. These facts were shown before the Corporation Commission before its order was made on March 25, 1914, and upon the trial of this cause the facts are undisputed. Notwithstanding these very vital and controlling facts before the Court, directly bearing on and *prima facie* establishing the defendant's alleged defense, no special finding or anything with regard thereto was made by the Court."

And the learning justice writing the minority opinion states:

> "Hence the evidence establishes the fact that the movement of the Campbell's United Shows

> from Tucson to Phoenix was a movement along a connecting link of the journey contemplated and commenced at Deming in the State of New Mexico, and intended to terminate within the State of California, in the course of which journey the intention of the shipper was to pass over the Southern Pacific Company's road from Tucson to Phoenix in the State of Arizona, as a definite portion and continuation of such journey, of which intention the Southern Pacific Company had full notice."

The facts in the case at bar are on this issue without conflict and we believe clearly establish that when the show left Texas it was its intention to proceed thence through New Mexico to Arizona and California, endeavoring to secure private carrier contracts for its transportation and if as to one or more of the railroad links in its journey it could not secure such private contracts to secure common carriage at the regular tariff rates, but in any event to land in California.

We respectfully submit that the fact that in said journey it was to use a number of separately operated railroads is of no importance under the decision in *South Covington Ry.* vs. *Covington*, 235 U. S. 537, where it is said on page 545 (italics ours):

> "This Court has repeatedly held that whether given commerce is of an interstate character or not is to be determined by what is actually done, and if the transportation is really and in fact between States, the mere arrangements of billing *or plurality of carriers* do not enter into the conclusion. Here is an uninterrupted transportation of passengers between States, on the same cars, and under practically the same management, and for a single fare. We have no doubt

> that this course of business constitutes interstate commerce. *Texas & New Orleans R. R.* vs. *Sabine Tram Co.*, 227 U. S. 111; *St. Louis, S. F. & T. R. R.* vs. *Seale*, 229 U. S. 156; *Railroad Commission of Ohio* vs. *Worthington*, 225 U. S. 101; *Omaha & Council Bluffs Street Ry.* vs. *Interstate Commerce Commission*, 230 U. S. 324, 336."

Nor is it material that one link in this transportation was entirely within a state because, as said in *United States* vs. *Union Stock Yards of Chicago*, 226 U. S. 266, at page 304:

> "That the service is performed wholly in one State can make no difference if it is a part of an interstate carriage."

and on the same page, the Court said:

> "Nor does it make any difference that neither the junction company or the stock yards company issued through bills of lading. It is the character of the service rendered, not the manner in which the goods are billed which determined the interstate character of the service."

In *Missouri, Kansas & Texas Railway Company* vs. *Texas*, 245 U. S. 484, it is held that where, in regular course, a passenger is moved by one company from one state to a point in another and is there taken charge of and carried to destination by a second company, local to the second state, it is erroneous to hold that its interstate character is lost because the second company employs new crews and engines and cannot go beyond the state line.

We respectfully submit that the *Gulf, Colorado & Santa Fe case, supra*, relied upon by the Court below, is completely disposed of in the case at bar and that our contentions herein are entirely upheld by the language of this Court in *Western Oil Refining Company* vs. *Lipscomb*, 244 U. S. 346, wherein it is said (p. 348):

> "In the second part of the decision we think the Court erred. Unlike *Gulf, Colorado & Santa Fe Ry.* vs. *Texas*, 304 U. S. 403, this is not a case where at the time of the original billing the shipper had no purpose to continue the transportation beyond the destination then indicated; nor is it a suit, as was that, to penalize a carrier which rightly conformed its action to what was said in the bill of lading. On the contrary, it is a case where the shipper intended from the beginning that the transportation should be continued beyond the destination originally indicated and where there is nothing which requires that decisive effect be given to the bill of lading. Ordinarily the question whether particular commerce is interstate or intrastate is determined by what is actually done and not by any mere billing or plurality of carriers, and where commodities are in fact destined from one state to another a rebilling or reshipment en route does not of itself break the continuity of the movement or require that any part be classified differently from the remainder. As this Court often has said, it is the essential character of the commerce, not the accident of local or through bills of lading, that is decisive. *Southern Pacific Terminal Co.* vs. *Interstate Commerce Commission*, 219 U. S. 498; *Ohio Railroad Commission* vs. *Worthington*, 225 U. S. 101; *Texas & New Orleans R. R. Co.* vs. *Sabine Tram Co.*, 227 U. S. 111; *Louisiana Railroad Commission* vs. *Texas & Pacific Ry. Co.*,

229 U. S. 336; *Chicago, Milwaukee & St. Paul Ry. Co.* vs. *Iowa*, 233 U. S. 334, 343; *South Covington & Cincinnati Street Ry. Co.* vs. *Covington*, 235 U. S. 537, 545."

It will also be noted that in the *Lipscomb* case there was a rebilling because the carriers would not allow a stopover privilege, as to which this Court says (p. 350):

> "Certainly the transportation of the merchandise destined to Mount Pleasant was not completed when it reached Columbia; nor was the continuity of its movement broken by its temporary stop at that place. As to that merchandise the journey to Columbia and the journey from there to Mount Pleasant were not independent, each of the other, but in fact and in legal contemplation were connected parts of a continuing interstate movement to the latter place."

The character and continuity of the Campbell's Shows movement was clearly made to appear by the evidence before the Corporation Commission, as well as before the Superior Court, and as the point of interference with interstate commerce was raised before and decided by the Supreme Court of Arizona, we take it that it is immaterial if it be true, as believed by the Court below (Record, p. 77) that the point of interstate commerce was not raised in the proceedings before the Commission.

II.

The Arizona Corporation Commission unlawfully endeavored by its order to regulate the Southern Pacific Company in respect to its right to make or refuse to make a private contract as a private carrier for the transportation of circuses and like traveling shows and in so doing attempted to deprive it of the equal protection of the law and by the order as well as by the fine to take its property without due process of law.

It is, we respectfully submit, entirely plain from the record that throughout the journey of Campbell's United Shows from El Paso, as their starting point, to California as their destination, they had in mind a movement of persons, private cars, freight and baggage under a series of special, private contracts with the roads over which they desired to move, all of which were to be integral parts of a continuous interstate journey. We think it equally plain that the shows had no desire to pay common carrier rates for their transportation. They endeavored at El Paso to obtain a private contract for transportation over the Southern Pacific to Tucson. Being delayed in that they came to Tucson by the El Paso & Southwestern. At Tucson they endeavored to obtain a private contract with the Arizona Eastern and the Southern Pacific to Phoenix with California as their ultimate destination on a continuous journey. At Phoenix they intended to and actually did proceed therefrom to California over the Santa Fe lines under a private contract.

It is undisputed that the lawful tariff rates for common carrier transportation of the company's privately owned cars, equipment and personnel were far greater than the mileage rate customarily applied in private contracts for the moving of shows of that character.

It is also plain from the evidence, including the tariffs introduced in evidence, and indeed is conceded by the opinion of the Arizona Court that the Southern Pacific Company did not hold itself out as willing to carry as a common carrier the cars, equipment and personnel of shows such as the Campbell's United Shows, but that it insisted that it had the privilege of granting or declining a private contract for such movement.

We respectfully submit that it is equally obvious that what the Commission intended to effect by its order was to compel the Southern Pacific and its connecting line, the Arizona Eastern, to make with the Campbell's Shows a private contract for their transportation at a mileage rate with the same privileges and under the same conditions as the private contract with the Sells-Floto Shows referred to in the order of the Commission at page 60 of the record.

Thus by compelling the plaintiff in error to make such a private contract or in default thereof to suffer punishment for contempt of court the constitutional rights of the plaintiff in error were violated, considering that it was compelled thereby to assume a risk which common carriers universally will not assume

as common carriers, and to contract for a character of service which it was not willing to perform without a special, private contract as a private carrier and to so contract at rates greatly less than the tariff rates which would have governed the movement in an ordinary way in common carriage by regular trains and subject to the operating convenience of the railroad company and to its entire operating control.

That the railroad company may decline to hold itself out as a common carrier of circuses and like enterprises and that it may as a private carrier make private contracts therefor fixing the rates therein and if proper to it reducing them in consideration of the decrease of liability was we respectfully submit abundantly supported by an unbroken current of authority until the majority opinion of the Arizona Supreme Court in the case at bar.

It has been recognized so recently by this Court as in the case *Chicago, Rock Island & Pacific* vs. *Mancher*, No. 85, October Term, 1918, decided January 7, 1919, in which, speaking of a contract of the precise character of the one desired by the Campbell's Shows and attempted to be enforced upon this plaintiff in error by the Arizona Commission, the Court says of an employee of the circus company:

> "Furthermore, plaintiff was not even a passenger upon the railway. His claim rests not upon a contract of carriage but upon the general right of a human being not to be injured by the negligence of another."

This Court then refers to *Santa Fe, Prescott and Phoenix Railway Company* vs. *Grant Brothers Construction Company*, 228 U. S. 177, where it is held that the rule that a common carrier in the prosecution of its business as such is not permitted to drop its character and transmute itself by contract into a mere bailee—

> "has no application when a railroad company is acting outside the performance of its duty as a common carrier. In such case, it is dealing with matters involving ordinary considerations of contractual relation: those who choose to enter into engagements with it are not at a disadvantage; and its stipulations even against liability for its own neglect are not repugnant to the requirements of its public service. The rule extends no further than the reason for it. It is apparent that there may be special engagements which are not embraced within its duty as a common carrier although their performance may incidentally involve the actual transportation of persons and things, whose carriage in other circumstances might be within its public obligation. *Baltimore & Ohio etc. Railway Co.* vs. *Voight*, 176 U. S. 498, and cases cited; *Northern Pacific Railway Co.* vs. *Adams*, 192 U. S. 440; *Long* vs. *Lehigh Valley R. R. Co.*, C. C. A., 2d Circuit, 130 Fed. Rep. 870."

The *Grant Brothers case*, *supra*, cites with approval the leading case of *Baltimore & Ohio etc. Railway* vs. *Voight*, 176 U. S. 498, which considered a contract made between an express company and a railway company under which the express messengers were held not to be passengers.

In the *Voight* case there are cited with approval the following cases involving circus contracts differ-

ing in no material respect from the one here considered:

Robertson vs. *Old Colony Railroad*, 156 Mass. 526;

Coup vs. *Wabash, St. Louis &c. Railway Co.*, 56 Mich. 111;

Chicago, Milwaukee & St. Paul Railroad vs. *Wallace*, 24 U. S. App. 589.

An elaborate discussion of the reasons why a common carrier is permitted to make these special circus contracts as a private carrier in cases in which it is not willing to handle the circus as a common carrier is contained in the opinion of the Circuit Court of the Northern District of Georgia in *Wilson* vs. *Atlantic Coast Line*, 129 Fed. 774, affirmed in 133 Fed. 1022, by the Circuit Court of Appeals.

Also to the same effect in holding the railroad company's right to make these contracts as a private carrier are the following authorities:

Chicago, M. & St. P. R. Co. vs. *Wallace*, 66 Fed. 506;

Cluff vs. *Grand Trunk Western Ry.*, 155 Fed. 81;

1 *Hutchinson on Carriers*, (3rd Ed.) Sec. 88;

Moore on Carriers, Sec. 38, pp. 79 and 80.

The extent to which these decisions might be used to require a railroad company to transport a circus or like enterprise as a common carrier is only that where it is holding itself out as ready and willing to

transport them without a private contract and as a common carrier it may not, under familiar principles of common carriage, admit one to its rails and deny another.

The considerations which have moved the courts to affirm this right of private carriage by a common carrier are, as applied to circuses and similar enterprises, that they move from point to point largely and sometimes entirely with their own equipment; that they carry wild animals as to the value of which and the dangers from which the railroad company is entitled to release itself from liability, or at least to obtain indemnification from the circus company by contract provisions not permissible in the movement of domestic livestock; that these circuses move on their own schedules; are, as a rule, loaded and unloaded by their own employes; combine passenger equipment with freight equipment in the same train, which is seldom done on main lines in modern railroading; fix their own schedule and hours of arrival and departure; disarrange and make more difficult and less safe the operation of ordinary common carrier business of the railroad, and that in view of these considerations and the others adverted to and elaborated on in the decisions above referred to, the railroad is entitled to say to all circus companies or organizations of like character: "We will not transport you over our lines unless we are satisfied to enter into a private contract with you by which, in consideration of our giving you a different and less rate from that which you would be obliged to pay

under our regular published tariffs for commercial common carrier service, you will agree to abide by certain operating conditions fixed by that contract and will further agree to limit our liability to you for loss of or damage to your equipment or property and to indemnify us against any claim made by your employes for damages sustained while we are carrying your equipment and personnel under the contract."

That the handling of circuses and like enterprises in that way has grown into an established and recognized custom, is shown by the references to the various circus contracts in the cases above referred to and is illustrated by the remarkable correspondence between the contract of 1902, quoted in full in 129 Federal Reporter at page 776, and the contracts issued by the Santa Fe to Campbell's United Shows, reproduced in facsimile as Exhibits 3 and 4 in the record in the case at bar.

We respectfully submit therefore that when, as here, a railroad company is doing business within a state as a common carrier only as to those classes of goods which it holds itself out as willing to carry for all comers, or as some decisions say of all classes of goods which are customarily handled by such a common carrier as a common carrier, it is not competent for the State, no matter how broad its organic law may be, to compel that railroad company to forego its right of selection of those with whom it is willing to contract as a private carrier, even though, as will doubtless be contended here, its refusal so to pri-

vately contract is based upon an existing private contract with another and similar organization under which it agrees not to move another organization over its lines under private contract within thirty days of the show dates of the organization already holding the contract.

That the state has the power in matters of intrastate commerce to prohibit and prevent discrimination, to require equal treatment of patrons by a common carrier, to punish such discrimination and to take all steps appropriate to attain those objects is too well established to admit of doubt, but in all of that there must exist the element that the company against whom the order is directed shall have held itself out to be a common carrier of the particular traffic in aid of which the orders are made, or that it has so used its property that the Court will say that that property has been dedicated or devoted to the common carriage sought to be enforced by the orders.

We take it that it is not necessary in order to render an order or a statute obnoxious to the restraint of the Federal Constitution "that it must in terms or in effect authorize the actual physical taking of the property or the thing itself so long as it affects its free use and enjoyment or the power of disposition at the will of the owner."

Forster vs. *Scott*, 136 N. Y. 577, 18 L. R. A. 543, 32 N. E. 976;

Monongahela Nav. Co. vs. *United States*, 148 U. S. 336, 37 L. ed. 471, 13 Sup. Ct. Rep. 622.

We respectfully submit that the effect of the decision of the Arizona Supreme Court that the Corporation Commission may compel the making of a contract by a railroad company as a private carrier by the fiction of compelling it to move, at rates less than those established by tariff, an enterprise which it is not willing to move, except as a private carrier, and which it does not hold itself out and never has held itself out as willing to transport except as a private carrier, is to take its property without due process of law and to deny it the equal protection of the law.

Carried to its logical conclusion, the opinion of the Court below holds that common carriers by rail cannot make private contracts of carriage for circuses and like exhibitions unless they are willing to extend the same rates to other similar organizations irrespective of the considerations of the physical character of the privately owned equipment, the responsibility under indemnity clauses, the value of the waivers of liability, the scheduled moves, the increased passenger traffic from excursions to show points, the moral character and consequent hazard of the traveling organization, and its followers, the character of the performances, and many other considerations quite apart from the question of how many cars are to be hauled or how many ton-miles are involved.

To place such contracts under the jurisdiction of bodies authorized by law to regulate the common carrier activities of the corporation is to deprive it of all right to make private contracts of that character in respect to services which it has not held itself out as

willing to furnish all comers and to which either by its act or by custom its property has not been publicly dedicated. All this without any recompense to the carrier for this involuntary devotion to public use in an uncustomary manner.

Whether such contracts may be required to be filed with or subject to inspection by a regulatory body is, we think, not germane to this inquiry.

III.

It is respectfully submitted that the judgment of the Supreme Court of the State of Arizona entered on May 19, 1917, and shown at page 103 of the record should be reversed.

Respectfully submitted,

C. W. Durbrow,
Henley C. Booth,
Solicitors for Plaintiff in Error.

Wm. F. Herrin,
Of Counsel.

Dated at San Francisco, California, this 23rd day of January, 1919.

APPENDIX

Excerpts From Arizona Constitution

ARTICLE XV.

THE CORPORATION COMMISSION.

SECTION 1. "A Corporation Commission is hereby created * * *."

SECTION 2. "All corporations other than municipal engaged in carrying persons or property for hire; or in furnishing gas, oil or electricity for light, fuel, or power; or in furnishing water for irrigation, fire protection, or other public purposes; or in furnishing, for profit, hot or cold air or steam for heating or cooling purposes; or in transmitting messages or furnishing public telegraph or telephone service, and all corporations other than municipal, operating as common carriers, shall be deemed public service corporations."

SECTION 3. "The Corporation Commission shall have full power to, and shall, prescribe just and reasonable classifications to be used, and just and reasonable rates and charges to be made and collected, by public service corporations within the State for service rendered therein, and make reasonable rules, regulations, and orders, by which such corporations shall be governed in the transaction of business within the State, and may prescribe the forms of contracts and the systems of keeping accounts to be used by such corporations in transacting such business, and make and enforce reasonable rules, regulations, and orders for the convenience, comfort, and safety, and the preservation of the health, of the employees and patrons of such corporations; Provided, that incorporated cities and towns may be authorized by law to exercise supervision over public service corpo-

rations doing business therein, including the regulation of rates and charges to be made and collected by such corporations; Provided further, that classifications, rates, charges, rules, regulations, orders, and forms or systems prescribed or made by said Corporation Commission may from time to time be amended or repealed by such Commission."

* * * * * * * * *

SECTION 12. "All charges made for service rendered, or to be rendered, by public service corporations within this State shall be just and reasonable, and no discrimination in charges, service, or facilities shall be made between persons or places for rendering a like and contemporaneous service, except that the granting of free or reduced rate transportation may be authorized by law, or by the Corporation Commission, to the classes of persons described in the Act of Congress approved February 11, 1887, entitled An Act to Regulate Commerce, and the amendments thereto, as those to whom free or reduced rate transportation may be granted."

* * * * * * * * *

SECTION 16. "If any public service corporation shall violate any of the rules, regulations, orders, or decisions of the Corporation Commission, such corporation shall forfeit and pay to the State not less than one hundred dollars nor more than five thousand dollars for each such violation, to be recovered before any court of competent jurisdiction."

* * * * * * * * *

SECTION 19. "The Corporation Commission shall have the power and authority to enforce its rules, regulations and orders by the imposition of such fines as it may deem just, within the limitations prescribed in Section 16 of this Article."

Excerpts From Arizona Public Service Corporation Act. Chapter 90, Arizona Laws of 1912, reprinted as Sections 2277 to 2360, inclusive, "Revised Statutes of Arizona 1913; (Civil Code).

CIVIL CODE.

(The following references are to section numbers of Civil Code.)

2277. "This chapter shall be known as the "Public Service Corporation Act" and shall apply to the public service corporations herein described and to the commission herein referred to."

* * * * * * * *

2278 * * (i.) "The term 'Railroad', when used in this chapter, includes every commercial, interurban, and other railway, other than a street railroad, and each and every branch or extension thereof, by whatsoever power operated, together with all tracks, bridges, trestles, rights of way, subways, tunnels, stations, depots, union depots, yards, grounds, terminals, terminal facilities, structures, and equipment, and all other real estate, fixtures, and personal property, of every kind used in connection therewith, owned, controlled, operated, or managed for public use in the transportation of persons or property."

* * * * * * * *

(z.) "The term 'Public service corporation', when used in this chapter, includes every common carrier, pipe line corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, and warehouseman, as these terms are defined in this section, and each thereof is hereby declared to be a public service corporation and to be subject to the jurisdiction, control, and regulation of the commission and to the provisions of this chapter."

2295. "No public service corporation shall, as to rates, charges, service, facilities, or in any other re-

spect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage. No public service corporation shall establish or maintain any unreasonable difference as to rates, charges, service, facilities or in any other respect, either as between localities or as between classes of service. The commission shall have the power to determine any question of fact arising under this section."

2357. "In case any public service corporation, corporation or person shall fail to observe, obey or comply with any order, decision, rule, regulation, direction, demand or requirement, or any part or portion thereof, of the commission or any commissioner, such public service corporation, corporation or person shall be in contempt of the commission and shall be fined by the commission a sum not less than one hundred dollars nor more than five thousand dollars, to be recovered before any court of competent jurisdiction, in this state."

"Procedure had in such contempt proceedings shall be the same as in courts of record in this state. The remedy prescribed in this section shall not be a bar to or affect any other remedy or remedies."

MAR 0

IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1918.

No. 238

(OCTOBER TERM, 1917, No. 616).

SOUTHERN PACIFIC COMPANY,
Plaintiff in Error,
vs.
THE STATE OF ARIZONA.

BRIEF FOR THE STATE OF ARIZONA

In Error to the Supreme Court of the State of Arizona

WILEY E. JONES,
Attorney General of the State of Arizona, and Attorney for the State of Arizona.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1918

No. 238

(OCTOBER TERM, 1917, No. 616).

SOUTHERN PACIFIC COMPANY,
Plaintiff in Error,
vs.
THE STATE OF ARIZONA.

BRIEF FOR THE STATE OF ARIZONA

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARIZONA

STATEMENT OF CASE

On the 20th day of March 1914, there was promulgated under the authority and seal of the Arizona Corporation Commission an order to show cause why the Arizona Corporation Commission should not issue a special rate authority, compelling the plaintiff in error (defendant before the Commission) to publish a rate for the

transportation of Campbell's United Shows from Tucson, Arizona to Maricopa, Arizona, at the rate of $3.00 per mile.

Pursuant to said order to show cause, plaintiff in error appeared before the Arizona Corporation Commission on the 25th day of March, 1914 and after a hearing the Arizona Corporation Commission entered an order that the Southern Pacific and Arizona Eastern Railroad Company transport the cars, property, and employees of Campbell's United Shows from Tucson, Arizona via Maricopa to Phoenix, Arizona, for a total amount not to exceed $3.00 per train per mile for the entire service.

On the 28th day of March, 1914, the Arizona Corporation Commission denied the application of plaintiff in error (defendant before the Commission) for a re-hearing of its order above mentioned. Plaintiff in error refused to comply with the order made by the Arizona Corporation Commission.

On the 31st day of March, 1914, the Attorney General filed a petition praying the Arizona Corporation Commission that an order be entered, directed to the defendant, requiring it to show cause why it should not be punished for contempt of the order of the Commission.

Pursuant to said petition, a hearing was had and the defendant was adjudged guilty of contempt of the order of the Commission and a fine imposed upon the defendant in the sum of $1500.

The defendant refused to pay and satisfy the fine imposed on it by order of the Commission.

On the 20th day of June, 1914, the Attorney General of Arizona filed a complaint in the Su-

perior Court of the State of Arizona in and for the county of Maricopa vs. plaintiff in error (defendant) in said Superior Court, praying for the recovery of the said sum of $1500, the fine assessed against said defendant by the Corporation Commission for a contempt of the order of said Commission.

Said Superior Court rendered judgment in favor of the State of Arizona vs. the Southern Pacific Railroad Company for $1500, the sum prayed for in State's complaint. Thereupon the Southern Pacific Company (plaintiff in error) appealed from said judgment to the Supreme Court of the State of Arizona.

The Supreme Court of the State of Arizona, on May 19, 1917, handed down its decision affirming the judgment of the Lower Court which opinion is reported in

165 Pac. 303.

Plaintiff in error being dissatisfied with the decision of the Supreme Court of the State of Arizona affirming the decision of the Lower Court, now brings thise case before this Court. The two principal issues of law relied upon by plaintiff in error are:

First. The question of the jurisdiction of the Corporation Commission to make the order upon which the fine was based.

Second. The question of the equal protection of the law, and the taking of property without due process of law, by the Arizona Corporation Commission by its order regulating the rate to be charged by said Company.

We shall argue that the Arizona Corporation Commission did have jurisdiction to establish a

rate for the transportation of those shows, from Tucson to Phoenix, as said transportation was wholly intrastate and not interstate, and that such regulation by the Commission did not deprive the Southern Pacific Company of the equal privilege of law, and did not deprive it of its property without due process of law.

ARGUMENT

In the beginning of our argument will state that the Supreme Court of the State of Arizona, in the case of the Southern Pacific Company, a corporation, vs. State of Arizona, has decided this case on appeal from the Lower Court in a carefully written opinion citing the best authorities in support thereof, and we will therefore incorporate this opinion in full in this brief. The opinion is reported in:

165 Pac. 303

and is as follows:

"ROSS J. This is an action to recover a fine assessed against appellant by the Corporation Comission for contempt in refusing to obey an order of the Corporation Commission directing it to transport Campbell's United Shows from Tucson to Phoenix, Arizona. Authority for the action is found in paragraph 2356, c. 11, title 9, Civil Code 1913.

"In the complaint were set forth all the proceedings before the Commission, including its findings of fact, conclusions of law, orders and judgments, both in the original hearing and the hearing in contempt. The answer of the appellant consists of: (1) Demurrers, general and special, the special being that the court had no juris-

diction of either the person or subject-matter; (2) averments that the order made and entered was not supported or sustained by any competent evidence or by any evidence whatsoever, or that any lawful proceeding was held by said commission in the matter of fixing rates; (3) that the Corporation Commission was without jurisdiction to fix rates for transportaing Campbell's United Shows from Tucson to Phoenix for the reason, among others, that the movement of said shows between the named points was interstate in character, the said shows being engaged in a journey beginning at El Paso, Tex., and extending through the states of New Mexico and Arizona and Arizona into California, the destination of said Campbell's United Shows having been fixed at the city of San Bernardino, Cal., at the time said shows began their journey at said city of El Paso; and (4) that the Commission had no jurisdiction to make or enter said order for the further reason that there were no intrastate tariffs then on file with said Commission showing the rate for the movement of privately owned equipment in circus trains or otherwise obliging defendant to transport privately owned equipment in circus trains.

"The court's findings of fact and conclusions of law are as follows:

"II. That on the 20th day of March, 1914, there was promulgated under the authority and seal of the Arizona Corporation Commission in Docket No. 165 of that commission an order to show cause, on or before the 23rd day of March, 1914, why the Arizona Corporation Commission should not issue a special rate authority compelling the defendant to publish on one day's notice a rate for

the transportation of Campbell's United Shows, consisting of 18 cars, from Tucson, Ariz., to Maricopa, Ariz., at the rate of $3 per mile, and further requiring the defendant to furnish such equipment as was necessary to move Campbell's United Shows within the state of Arizona.

"III. That pursuant to said order to show cause, the defendant appeared before the Arizona Corporation Commission on the 25th day of March, 1914, and after a full and fair hearing the Arizona Corporation Commission entered the following Order: That the Southern Pacific Company and Arizona Eastern Railroad Company transport the cars, property, employees and attendants of Campbell's United Shows from Tucson, Ariz., via Maricopa, to Phoenix, Arizona and to extend to the said Campbell's United Shows the usual privileges in the movement of advance agents, for a total amount not to exceed $3 per train for the entire service. It is understod that the shipment will consist of not to exceed four coaches, four large box cars and ten flat cars, and it is further understood that the Southern Pacific Company and Arizona Eastern Railroad Company may enter into a contract covering this transportation, the terms of which shall not be in substantial variance with the contract now existing between the Arizona Eastern Railroad Company and Sells-Floto Shows Company, with respect to details as to responsibility, service and conditions, copy of said contract being on file with the commission, and made on March 4, 1914, by and between the Arizona Eastern Railroad Com-

pany and Sells-Floto Shows Company. It is further ordered that, upon submission of evidence that any charge or charges have been exacted by respondent companies for transportation of advance agents or employes, at variance with contract herein referred to, made by respondent Arizona Eastern Railroad Company with Sells-Floto Company, that the amount or amounts so collected shall be refunded to Campbell's United Shows.'

'IV. That on the 28th day of March, 1914, the Arizona Corporation Commission denied the defendant's application for a rehearing of said order recited in paragraph III hereof.

'V. That said order entered by the Arizona Corporation Commission on the 27th day of March, 1914, as recited in paragraph III hereof, was not complied with by defendant, but wholly ignored.

'VI. That on the 31st day of March, 1914, the State of Arizona, at the relation of George P. Bullard, Attorney General, filed a petition addressed to the Arizona Corporation Commission, praying that an order be entered, directed to the defendant, requiring it to show cause why it should not be punished for contempt of the order of the Arizona Corporation Commission, as recited in paragraph III hereof, and that pursuant to the said petition, the Arizona Corporation Commission, on the 1st day of April, 1914, entered an order, directed to the defendant, requiring it to show cause on the 13th day of April, 1914, at 10 o'clock a. m., why it should not be punished for contempt, as alleged in the said petition of the State of Arizona, at the relation of George

P. Bullard, its Attorney General, as aforesaid.

'VII. That pursuant to said petition of the State of Arizona, at the relation of George P. Bullard, Attorney General, a hearing was had, and the defendant was adjudged guilty of a contempt of the order of the Arizona Corporation Commission, recited in paragraph III hereof, whereupon the Arizona Corporation Commission, upon the 16th day of May, 1914, entered the following order: 'It is therefore ordered that the Southern Pacific Company be and it is hereby declared in contempt of this commission's order, in docket No. 165, and the said company be and it is hereby fined the sum of $1,500.00. It is further ordered that Arizona Eastern Railroad Company be and it is hereby declared in contempt of this commission's order, in docket No. 165, and that the said company be and it is hereby fined the sum of $500. It is further ordered that copies of this order be served upon Southern Pacific Company and Arizona Eastern Railroad Company, and the Attorney General of the state of Arizona, and unless the fines, as herein imposed, be paid and satisfied on or before June 1, 1914 that the Attorney General shall proceed to the collection of same as provided by law.'

'VIII. That the defendant refused to pay and satisfy the fine imposed by said order of the commission, as recited in paragraph VII herein, on or before June 1, 1914, and thereafter, to-wit, on the 20th day of June, 1914, the state of Arizona filed with the above-entitled court its complaint against the defendant, which prayed for the recovery of the sum of $1,500, the fine assessed against the defendant

by the Arizona Corporation Commission for a contempt of the order of said Arizona Corporation Commission, as recited in paragraph III hereof hereof.

'IX. That the defendant engaged itself to transport for hire circuses and other institutions similar to that conducted by Campbell's United Shows, which the defendant was required to transport, as provided by the order recited in paragraph III hereof.

'CONCLUSIONS OF LAW

'The court from the above special findings of fact concludes as a matter of law therefrom as follows:

'I. That the Arizona Corporation Commission had jurisdiction of the person of the defendant and the subject-matter of the action, and was authorized and empowered by the Constitution and laws of the state of Arizona to enter the order as recited in paragraph III of the special findings of fact, and to adjudge the defendant in contempt for a refusal to obey said order.

'II. That the above-entitled court has jurisdiction of the person of the defendant, and the subject-matter of the above-entitled cause of action, and is empowered by the Constitution and laws of the state of Arizona to enforce and collect the fine imposed upon the defendant by the Arizona Corporation Commission for a violation of the order of that commission, as recited in paragraph III of the special findings of fact herein.

'III. That the order of said Arizona Corporation Commission as recited in paragraph

III of the special findings of fact, in no way imposed a burden upon interstate commerce, in contravention of section 8 of article 1 of the Constitution of the United States.

'IV. That it was the duty of the defendant, under the Constitution and laws of the state of Arizona, to transport Campbell's United Shows, as provided by the order of the Arizona Corporation Commission, as recited in paragraph III of the special findings of fact, even though it acted in such capacity as a private carrier, for the reason that it had held itself out and engaged to transport circuses and other institutions similar to Campbell's United Shows.

'V. That even though the defendant, in the transportation of Campbell's United Shows, engaged itself as a private carrier, it so engaged itself as a carrier for hire, and was, under the Constitution and laws of the state of Arizona, subject to regulation by the Arizona Corporation Commission.

'VI. That the order of the Arizona Corporation Commission as recited in paragraph III of the special findings of fact did not impair the liability of the defendant as a private carrier.

'VII. That the plaintiff is entitled to judgment against the defendant for the sum of $1,500'."

The questions raised on this appeal by the appellant in its assignments of error are whether the original proceedings by the Corporation Commission fixing the rate to be charged Campbell's United Shows for transportation from Tucson to

Phoenix was null and void for the reason: (1) That there was no formal complaint filed against the appellant with the Corporation Commission either on its own motion or on the motion of any third party; that at the hearing the witnesses who made statements to the commission in the nature of evidence were not sworn; and (2) if these statutory requirements and formalities were waived by the appellant, whether the movement of Campbell's United Shows was an interstate transaction, and therefore not within the jurisdiction of the State Corporation Commission; also (3) whether the Corporation Commission had jurisdiction to make its order requiring the appellant to enter into a special contract as a private carrier for the transportation of the privately owned equipment of Campbell's United Shows; and (4) whether the statute authorizing the assessment of a fine for disobedience of its order is constitutional.

(1) We do not think that the appellant is in a position to complain of the informal and irregular manner in which the proceeding was instituted before the commission, nor because the witnesses were not sworn. A formal complaint setting forth a grievance against the appellant should have been filed and, of course, the testimony should have had the sanctity of an oath. These things seem to be required by the statute and by the rules of the Corporation Commission —paragraph 2336, Civil Code, 1913, and rule 5 of Practice and Procedure, A. C. C. The omission to follow the statute and the rules of the commission, when concurred in by the appellant, as was done in this case, no prejudice being apparent, ought not now be permitted to upset the whole proceeding. Although this question could have

been presented to the Corporation Commission by appellant on its motion for a rehearing, it was not done. Paragraph 2342, Id., among other things, provides:

> 'No cause of action arising out of any order or decision of the commission shall accrue in any court to any corporation or person or the state, unless such corporation or person, or the state, shall have made, before the effective date of said order or decision, application to the commission for a rehearing, such application shall set forth specifically the ground or grounds on which the applicant considers said decision or order to be unlawful. No corporation or person, or the state, shall in any court urge or rely on any ground not set forth in said application.'

"Again it is provided (paragraph 2329, Id.) that the commission shall not be bound by the technical rules of evidence, and that informality in proceedings or in taking testimony shall not invalidate any order, decision or rule approved by the commission.

(2) Of course if the movement of Campbell's United Shows from Tucson to Phoenix was an inter-state movement, the order of the commission was void for want of jurisdiction over the subject-matter. The evidence shows that this show was traveling around over the county giving exhibitions; that early in February, 1914, it was at El Paso, Tex.; that at that time its agent inquired of the appellant for rates from that place through New Mexico into Arizona with a probable destination into California. No arrangement was effected between the appellant and Campbell's United Shows for transportation over

appellant's line of railway. The shows, in fact, under a special contract with the El Paso & Southwestern Railroad Company, were transported from El Paso to Tucson with stop-overs at Douglas and Bisbee. When the show people made application to the appellant at Tucson for a contract to transport their equipment and entourage from Tucson to Phoenix, appellant stated to them that it could not make a contract as a common carrier; that it had already entered into a contract with Sells-Floto Shows to transport them from Tucson to Phoenix; and that under the rules it could not transport Campbell's United Shows for a space of 30 days after the Sells-Floto Shows had been transported.

In the hearing before the Corporation Commission in the matter of fixing a rate the attorney for the appellant gave two reasons for not entering into a contract with Campbell's United Shows: First, he said:

> 'We wish to take the position we are not common carriers for circuses and carnivals; we want that in the record.'

And second:

> 'I am not acquainted with this special 30-day contract, but I understand there is an agreement between all show people as well as railroads to keep the shows spaced. This show coming in before Sells-Floto and with which the company has a contract, if he tenders the money—the freight at the regular rate, we have to carry him.'

"There were the only reasons suggested by the appellant at the hearing before the commission for not entering into a contract to transport Campbell's United Shows from Tucson to Phoe-

nix. There was no suggestion or intimation at that time that the movement was an interstate movement, although the evidence discloses that the agent for Campbell's United Shows stated that the show would go from Phoenix to Prescott, Clarkdale and Kingman, and from Kingman to Needles, Calif.

"It developed that appellant and other railroads of this section of the country had been accustomed to enter into contracts of transportation with circuses and carnival shows at rates very much less than the regular tariffs and containing terms of exemption from the liability of common carriers; that Campbell's United Shows had such a contract in 1913 with appellant and other roads in this and contiguous states. It was in this action that appellant raised the question of the interstate character of the movement from Tucson to Phoenix, claiming it as an integral part of a continuous transportation from El Paso, Tex., through New Mexico, and Arizona to San Bernardino, Cal., and in support thereof introduced evidence of a contract with the Santa Fe to move Campbell's United Shows from Phoenix to Prescott, Clarkdale, Kingman, and thence into California.

"It is evident that when Campbell's United Shows started from El Paso, Tex., on the peregrinations of a traveling show, it had mapped out a route traversing several states and one familiar with the wanderings of such institutions would not undertake to place limitations upon its rovings by fixing its ultimate destination or many digressions from original plans. Its movements may be likened to that of a sight-seer in going from one state into another on a common carrier,

and, like the common carrier, both are subject to the rules, regulations, and laws applicable to interstate commerce. Each is entitled to and must pay the tariff rates as promulgated or approved by the Interstate Commerce Commission, but where the movement is wholly intrastate, and to be consummated under a separate and independent contract of transportation, even though it be an advance step along the general route outlined at the begining of the trip, we think it is the subject of state control and regulation. Having arrived in a state the show or traveler in "doing" the state could not claim or demand the scedule rate for interstate transportation, but must pay at the local or intrastate rate as long as the movement is from one stop in the state to another stop in the state.

We think the decision reached by the Supreme Court of the United States in Gulf, Colorado & Santa Fe Railway Co. v. Texas, 204 U. S. 403, 27 Sup. Ct. 360, 51 L. ed. 540, is decisive of this case. The salient facts in the above case were: Two carloads of corn were shipped from Hudson, S. D., with ultimate destination Goldthwaite, Tex.; the first lap of the movement was from Hudson to Texarkana, Tex.; at this place a change of ownership was effected and a bill of lading issued to the new owner, calling for the transportation of the two identical cars and contents from Texarkana, Tex., over the lines of the Texas & Pacific Railway Company and the Gulf, Colorado & Santa Fe Railway Company to Goldthwaite, to be delivered there to Saylor & Burnett, the last consignees and for whom the two carloads of grain were intended when first started on their journey from Hudson, S. D. The Gulf Colorado & Santa Fe Railway Company refused

to accept the charges from Texarkana to Goldthwaite as prescribed by the State Railroad Commission, and demanded and collected a larger sum, based upon the interstate rate. The state of Texas, in a statutory action for extortion, recovered judgment in the Texas courts; the railroad company appealed to the Supreme Court of the United States, contending that the movement from Texarkana, Tex., to Goldthwaite, Tex., was but an integral part of the movement from Hudson, S. D., to Goldthwaite, Tex., and interstate in character. The Supreme Court, speaking through Justice Brewer, said:

> 'The single question in the case is whether, as between Texarkana and Goldthwaite, this was an interstate shipment."

Further on he said:

> 'It is undoubtedly true that the character of a shipment, whether local or interstate, is not changed by a transfer of title during the transportation. But whether it be one or the other may depend on the contract of shipment. The rights and obligations of carriers and shippers are reciprocal. The first contract of shipment in this case was from Hudson to Texarkana. * * * The control over goods in process of transportation, which may be repeatedly changing by sales, is one thing; the transportation is another thing, and follows the contract of shipment, until that is changed by the agreement of owner and carrier.'

"And the court further said that the 'thought or purpose' of the shipper of the corn as to its further disposition "was a matter immaterial so

far as the completed transportation was concerned," and illustrated his meaning in the following language:

> 'In this respect there is no difference whatever between an interstate passenger and an interstate transportation. If Hardin, for instance, had purchased at Hudson a ticket for interstate carriage to Texarkana, intending all the while after he reached Texarkana to go on to Goldthwaite, he would not be entitled on his arrival at Texarkana to a new ticket from Texarkana to Goldthwaite at the proportionate fraction of the rate prescribed by the Interstate Commerce Commission for carriage from Hudson to Goldthwaite. The one contract of the railroad companies having been finished he must make a new contract for his carriage to Goldthwaite, and that would be subject to the law of the state within which that carriage was to be made.'

"Gulf, Colorado & Santa Fe Railway Co. v. Texas has been followed and approved by the following: Chicago, Milwaukee & St. Paul Railway Co. v. State of Iowa, 233 U. S. 334, 34 Sup. Ct. 592, 58 L. ed. 988; s. c. 152 Iowa, 317, 130 N. W. 802; Penna. R. R. Co. v. Mitchell, 238 U. S. 251, 135 Sup. Ct. 787, 59 L. ed. 1293; United States v. Phila. & R. Ry. Co. (D. C.) 232 Fed. 946; Acme Cement Plaster Co. v. Chicago & Alton Railroad Co., 17 Interst. Com. Com'n. R. 230. In Chicago, Milwaukee & St. Paul Railway Co. v. Iowa, supra, it is said:

> 'But the fact that commodities received on interstate shipments are reshipped by the consignees, in the cars in which they are re-

ceived, to other points of destination, does not necessarily establish a continuity of movement or prevent the reshipment to a point within the same state from having an independent and intrastate character. Gulf, Colorado & Santa Fe Ry. Co. v. Texas, 204 U. S. 403, (27 Sup. Ct. 360, 51 L. ed. 540); Ohio Railroad Commission v. Worthington, 225 U. S. 101, 109 (32 Sup. Ct. 653, 56 L. ed. 1004); Texas & N. O. R. R. Co. v. Sabine Tram Co., 227 U. S. 111, 129, 130 (33 Sup. Ct. 220, 57 L. ed. 442). The question is with respect to the nature of the actual movement in the particular case.'

"In Campbell's United Shows, including entertainers, attendants, and employes, there were about 110 "passengers" not distinguished in the application of the law from ordinary passengers when seeking transportation from a common carrier. The rest of the show consisted of baggage, animals, and some railroad equipment, the movements of which were necessarily coincident with the movement of the troop of entertainers, attendants, and employes.

"The three principal cases relied upon by the appellant to sustain his contention that the carriage of the Campbell's Shows from Tucson to Phoenix was an integral part of a continuous movement from El Paso, Tex., through New Mexico and Arizona to California, and therefore interstate in character, are Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 31 Sup. Ct. 279, 55 L. ed 310; Ohio Railroad Commission v. Worthington, 225 U. S. 101, 32 Sup. Ct. 653, 56 L. ed. 1004; Texas & New Orleans Railroad Co. v. Sabine Tram

Co., 227 U. S. 111, 33 Sup. Ct. 220, 57 L. ed. 442. These cases all pertained to foreign commerce originating in the interior of the United States, and at the time the shipments were started on their journey they were definitely destined to some foreign port. The very nature and character of the movements required different carriers and changes of billing at the point of exportation and sometimes before reaching the point of exportation; hence it is said in those cases that the mere "accident" of bills of lading and forms of contract of transportation does not change the movement from an interstate or foreign to an intrastate movement. Commenting upon those cases in Louisian Railroad Commission, 229 U. S. 336, reading at page 341, 33 Sup. Ct. 837, at page 839, 57 L. ed. 1215, the court said:

> 'In those cases there was necessarily a local movement of freight, and it necessarily terminated at the seaboard. But it was decided that its character and continuity as a movement in foreign commerce did not terminate, nor was it affected by being transported on local bills of lading. The principle enunciated in the cases was that it is the essential character of the commerce, not the accident of local or through bills of lading, which determines federal or state control over it. And it takes character as interstate or foreign commerce when it is actually started in the course of transportation to another state or to a foreign country." Penna. R. R. Co. v. Clark Coal Co., 238 U. S. 456, 35 Sup. Ct. 896, 59 L. ed. 1406.

"The articles involved in those cases, to-wit, cotton seed cake and cottonseed meal, coal and

lumber, were all articles of merchandise, the subject of barter and sale. The stoppage of them occasioned by the necessities of transportation during the course of their movement from the initial to the terminal points of shipment on a continuous movement to another state or foreign country may truthfully be said to be mere "accidents" of the movement. It is not so with a circus or carnival show, where the (incidents) or accidents of the movement, but are the only means by which the purposes of a circus or show may be accomplished; the movement of a circus and show being a mere accident to the object of its existence—the giving of exhibitions.

"(3) It is next contended that the Corporation Commission was without jurisdiction to make its order requiring appellant to transport Campbell's United Shows from Tucson to Phoenix, because no intrastate tariffs had been filed with the commission showing the rates for movement of privately owned equipment in circus trains, or otherwise, or obliging appellant to transport privately owned equipment in circus trains. That the appellant was under no common-law obligation to accept the privately owned equipment of Campbell's United Shows we think is well settled. It could entirely refuse to accept such transportation, or if it should accept it the law permitted the common carrier to dictate the terms upon which the privately owned equipment of such a concern was transported. Clough v. Grand Trunk Western Railway Co., 155 Fed. 81, 85 C. C. A. 1, 11 L. R. A. (N. S.) 446, and cases there cited.

"(4) The rule of the common law prevails in this jurisdiction, unless it has been changed and modified by statute. Looking to our statutes

and to our Constitution, we are satisfied that the common-law rule has been abrogated in this state so as to make it obligatory upon common carriers to accept and transport the privately owned equipment of circuses and other show outfits under the rules, regulations, and rates, when reasonable and just, prescribed by the Corporation Commission. Article 15, paragraph 2, of our Constitution provides that:

> 'All corporations other than municipal engaged in carrying persons or property for hire * * * shall be deemed public service corporations.'

Section 3 provides that:

> 'The Corporation Commission shall have full power to, and shall, prescribe just and reasonable classifications to be used, and just and reasonable rates and charges to be made and collected, by public service corporations within the state for service rendered therein, and make reasonable rules, regulations, and orders, by which such corporations shall be governed in the transaction of business within the state and may prescribe the forms of contracts and the systems of keeping accounts to be used by such corporations in transacting such business."

Chapter 11, title 9, Civil Code 1013, known as the "Public Service Corporation Act," provides for the organization, powers, and jurisdiction of the Corporation Commission. In section 2278 thereof subdivisions E, and F, the term "transportation of persons" is defined to include every service in connection with or incidental to the safety, comfort, or the convenience of the person

transported, and the receipt, carriage, and delivery of such person and his baggage; and the term "transportation of property" is defined to include every service in connection with or incidental to the transportation of the property. In subdivision Z, the term "public service corporation" is defined to include every common carrier; and further declares it to be subject to the jurisdiction, control, and regulation of the commission under the provisions of this chapter. Section 2280 provides that:

> "All charges made, demanded or received by any public service corporation * * * for * * * any service rendered or to be rendered, shall be just and reasonable."

—and prohibits unjust or unreasonable charges or demands for any service. Section 2290 requires every common carrier to file with the commission schedules showing the rates, fares, charges, and classifications for transportation between termini, within this state, of persons and property from each point upon its route to all other points thereon. It also requires every public service corporation other than a comon carrier, to file with the commission, under such rules and regulations as may be prescribed, like schedules. Schedule 2295 reads as follows:

> "No public service corporation shall, as to rates, charges, service, facilities, or in any other respect make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage. No public service corporation shall establish or maintain any unreasonable difference as to rates charges, service, facilities or in any other respect either

as between localities or as between classes of service. The commission shall have the power to determine any question of fact arising under this section.'

"Section 2307 vests the Corporation Commission with power and jurisdiction to supervise and regulate every public service corporation in the state, and to do all things convenient and necessary in the exercise of such power and jurisdiction. Section 2308 empowers the commission, after a hearing if it shall find any contract affecting rates, fares, charges, or classification to be unjust unreasonable, discriminatory, or preferential to determine the just, reasonable, or sufficient rates, fares charges, and classifications for contracts to be thereafter observed; and further authorizes this action of the commission upon a single rate fare, charge or contract.

"We think it was the intention of the law, both constitutional and statutory, that the Corporation Commission should have plenary power over every public service corporation transacting business in this state of a local nature. That this power of supervision extends to contracts for the transportation of both persons and property, whether effected in the capacity of private carrier or common or public carrier. Nor do we think that appellant can complain because it had neglected to file with the commission tariffs showing the rates for the movement of privately owned equipment of circuses and like organizations. These omissions may be excused, as stated by the Interstate Commerce Commission in its rules concerning circuses and other show outfits, owing to "the peculiar nature of this traffic and the difficulties of establishing rates thereon in advance of shipper's request describing the character and vol-

ume of the traffic offered," but it cannot justify a refusal upon application to fix just and reasonable rates or to enter into just and reasonable contracts.

"(3) For the first time the appellant raises the question in this court that the statute (section 2337) under which the Corporation Commission assessed the fine in question is unconstitutional and void. The attorney for the appellant in the trial court during the course of the trial entered the following oral stipulation:

> 'I am going further * * * and stipulate that if the Arizona Corporation Commission had power and authority and proceeded regularly as required by the statutes of the state of Arizona to enter the original order compelling us to promulgate and apply this original rate that they ordered, that then they have taken sufficient proceedings to adjudge us in contempt. That narrows the issues to determine whether or not the commission in first instant entered a valid order, their original order.'

"Notwithstanding this stipulation it is now urged that the law is unconstitutional because of the excessive fines and penalties provided, and we are referred to the cases of Bonbright v. Geary (D. C.) 210 Fed. 44, and Van Dyke v. Geary (D. C.) 218 Fed. 111, as authority for this contention. The question involved in those cases is not the one involved here. Those cases involved the danger of the public utility incurring a liability for every day the order of the commission was not observed or obeyed, pending an appeal to determine the validity of the order issued by the commission—the statute (section 2354) making

every violation each day's continuance thereof a separate and distinct offense.

"We think it is clear from a reading of those decisions that it was not so much the severity of the penalty as the daily cumulation of penalties while testing the legality of the commission's action that influenced the decisions against the validity of the law. In the Van Dyke case, Sawtelle, District Judge, quoted from Ex parte Young, 209 U. S. 123-144, 28 Sup. Ct. 441, 447 (52 L. ed. 714, 13 L. R. A., N. S., 932, 14 Ann. Cas. 764), the contention of the complainants as follows:

> 'The contention is urged by the complainants in the suit that the company is denied the equal protection of the laws, and its property is liable to be taken without due process of law, because it is only allowed a hearing upon the claim of the unconstitutionality of the acts and orders in question, at the risk, if mistaken, of being subjected to such enormous penalties, resulting in the possible confiscation of its whole property, that rather than take such risks the company would obey the laws, although such obedience might also result in the end (though by a slower process) in such confiscation. * * * Coming to the inquiry regarding the alleged invalidity of these acts, we take up the contention that they are invalid on their face on account of the penalties.'

"Further quoting from the Young case:

> 'We hold, therefore, that the provisions of the acts relating to the enforcement of the rates, either for freight or passengers, by imposing such enormous fines and possible im-

> prisonment as a result of an unsuccessful effort to test the validity of the laws themselves are unconstitutional on their face, without regard to the question of the insufficiency of those rates.'

"The decision in the Van Dyke case was limited in this language:

> 'On the authority of these cases and on principle we are of the opinion, and so decide, that said Act 90 of the First Legislature of the State of Arizona imposes such penalties and imprisonment as to practically deprive the complainant of the right to appeal to the court to determine the validity of the law and the orders of the Corporation Commission, and is therefore unconstitutional in that particular.'

"The order here applies to a single rate for one trip only. It was not a permanent order, and could not be violated but once; no daily accumulation of penalties or fines could result from its disobedience; the appellant took no chances of incurring accumulated fines and penalties in prosecuting this appeal, and, not being affected by the feature of the law held unconstitutional in the Van Dyke and Bonbright cases, is not in a position to raise the question.

"The judgment of the lower court is affirmed.

FRANKLIN, C. J., Concurs.
CUNNINGHAM, J. (Dissenting).

The above opinion carefully states the law, and the authorities therein cited are directly in point, one of the leading cases being the Gulf, Colorado and Santa Fe Railroad case (decided in

1907, and never abrogated, albeit distinguished which is the controlling law on the subject today).

We are confident that a thorough analysis of this case, together with the cases cited in support thereof, will convince this honorable court that the movement of Campbell's United Shows from Tucson, Arizona, to Phoenix, Arizona, was not an interstate shipment, but that in truth and in fact, and under the law expounded by the Supreme Court of the United States, said movement was wholly, and even under the most elastic construction of the law, an intrastate shipment, and that therefore the rates governing the same falls squarely within the jurisdiction of the Arizona Corporation Commission.

In the case of Talcott vs. Southern Pacific Railroad Company, the Interstate Commerce Commission held that it had no jurisdiction where a ticket was purchased from Los Angeles, Cal., to Tucson, Arizona, and at Yuma, Arizona, complainant got off the train upon which he was traveling and took a special train from there to Tucson.

Complaint was filed before the Interstate Commerce Commission for the reason that an overcharge was claimed on that part of the journey from Yuma to Tucson. The Commission held that the charge imposed for complainant's special train from Yuma to Tucson was beyond its jurisdiction and dismissed the complaint.

> Talcott vs. Southern Pacific Railroad Company, "Interstate Commerce Commission Reports," Vol. XXXIII, Pg. 292.

The intent and purpose of our law is to allow the Corporation Commission to regulate rates in

such cases as Talcott vs. Southern Pacific Railroad Company, supra. The reason and spirit of the law will prevail over its letter. Hicks vs. Krigbaum, 13 Ariz., 237, 108 Pac. 482. Leibes vs. Steffy, 4 Ariz. 11, 32 Pac. 261, 36 Cyc. 1168. Com. vs. Adams Exp. Co., 132 Ky. 720, 97 S. W. 386. James vs. United States Fidelity & G. Co., 133 Ky. 289, 117 S. W. 406. Pickett vs. United States, 216 U. S. 456, 54 L. ed. 566, 30 Sup. Ct. Rep. 305.

Every constitutional provision or statute must be construed with reference to the object intended to be accomplished. Missouri P. R. Co. vs. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161. Courts should avoid construction which would render a statute ineffective, or inefficient, or which would cause injury or even inconvenience; if another and more reasonable interpretation is present in the statute. Byrd vs. United States, 187 U. S., 118, 47 L. ed. 100, 23 Sup. Ct. Rep. 42.

It is not in the province of our court to make rates. The court cannot disturb the determination of the Corporation Commission as to the reasonableness of the rate fixed by it, unless it can at the same time see that the rate of return afforded under the rates fixed by the commission is so low as to practically result in confiscation, or to deprive a person of its property without due process of law. There was nothing to show that the rate fixed by the Corporation Commission in the case was unreasonable. Knoxville vs. Knoxville Water Company, 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148.

The Arizona Corporation Commission had jurisdiction of this case under our constitution

and laws. The order was regularly made and duly served. Plaintiff in error exercised its right of appeal to the highest court of the state of Arizona, which court held that the Corporation Commission had jurisdiction of this matter, and that it acted wholly within the power conferred upon it by law. The power, and not the mere expediency of its exercise, is the question.

The court will observe that in the cases discussed by plaintiff in error as determinative of the interstate character of the movement of the show from Tucson to Phoenix, the subject of transportation was in most cases a commercial commodity; in the case of Texas & New Orleans Railroad Company v. Sabine Tram Company, 227 U. S. 111, it was LUMBER, admittedly destined for export, and so marked on the way bill by the initial carrier; in Southern Pacific Terminal Company v. Interstate Commerce Commission and Young, 219 U. S. 498, it was COTTONSEED CAKE AND COTTONSEED MEAL, in the language of the court, "considered as having been delivered to a carrier for transportation to their foreign destination;" in the case of Railroad Commission of Ohio v. Worthington, etc., 225 U. S. 101, it was COAL, in the language of the court "which is thus, from the beginning to the end of its transportation, in interstate carriage. * * *; and in the case of United States v. Union Stock Yards of Chicago, 226 U. S. 286, it was LIVE STOCK, the shipments involved contemplating from their very incipiency (and in fact so moving) a crossing of state lines in their transportation from consignor to consignee—all commodities the object of whose transportation was (unlike that of an itinerant circus) final and complete consumption, and the

place where same were to be so finally used or consumed in each case determined whether the transportation from its initiation to its conclusion necessitated a crossing or leaving of state boundary lines.

We will now give a brief discussion to each of said decisions:

In the case of Southern Pacific Terminal Co. v. Interstate Commerce Commission and Young, 219 U. S. 498, at pages 503-506, the facts as recited by Justice McKenna are:

"The terminal company has on its property two piers, known as Pier A and Pier B, and has erected on them all facilities for handling imported and exported freight, and all freight which may come to or pass over its wharves, and it has abundant land under water upon which to erect other piers if they should become necessary. * * *

"The business of Young is that of a merchant and manufacturer, engaged in buying, selling and converting cottonseed cake and meal for his own account. He took possession of Pier C and the improvements erected thereon by the terminal company under his contract with the latter company, paying the price stipulated in the contract, and has placed thereon cake, sacking and grinding machines, representing an investment of $30,000. Young's business consists in buying cottonseed cake in the interior, shipping it to himself by carloads at Pier C, there grinding it into meal, sacking it, and loading it into steamships berthed at Pier C for export.

"All cottonseed meal cake passing over Piers A and B pays a wharfage of 20 cents per short ton. Young pays no wharfage or storage charge

other than as the same may be included in the rental of $15,000 per year. If any exporter handles cottonseed meal or cake over Pier C, the wharfage of 20 cents per ton is paid by him to Young. * * *

"On the present constructed docks of the Galveston Wharf Company and the terminal company, with the structures as now located thereon, there is not space enough to furnish all exporters doing business at Galveston with space for erecting machinery and handling export business in the same manner as is done by Young."

The case was an appeal from the Circuit Court to review a decree dismissing both bill and cross bill in a suit to enjoin the enforcement of an order of the Interstate Commerce Commission requiring carriers to desist from giving undue preference to Young.

The evidence, as stated in the opinion, disclosed that:

"The cake and meal purchased by Young are bought by him in Texas, Oklahoma, Louisiana and Arkansas, but chiefly in Texas, and shipped to him on bills of lading and way bills, showing the point of origin in those states and the destination at Galveston. The purchases are made for export, there being no consumption of the products at Galveston. His sales to foreign countries are sometimes for immediate and sometimes for future delivery, irrespective of whether he has the product on hand at Galveston. At times he has it on hand. At times, therefore, orders must be filled from cake to be purchased in the interior or then in transit to him. When the cake reaches Galveston it is ground into meal and sacked by Young, and for the meal thus ground and such

meal as has been brought to his customers he takes out ships' bills of lading made to his order."

The decision, in our opinion, is not in point. Obviously the Supreme Court took the position that the shipment of the cake and the meal to the wharf for *purposes other than shipping* was not to be countenanced or inferred.

We will go so far as to agree that if Phoenix were a seaport and Campbell's Shows, at the direction of the shipper, were transported *to a pier at the wharf*, the required transportation from Tucson to Phoenix would properly come within the jurisdiction of the Interstate Commerce Commission."

Plaintiff in error cites the case of Railroad Commission of Ohio v. B. A. Worthington, 225 U. S. 101, 56 L. ed. 1004, and quotes from the court's opinion. This case was an appeal to the U. S. Supreme Court to review the decree enjoining the enforcement of an order of the Ohio Railroad Commission, fixing a rate on lake-cargo coal.

The question at once arises: What is meant by lake-cargo coal? The finding of fact as practically borrowed and adopted by the Supreme Court was to the effect that

> "'It appears that bituminous coal, such as is mined in the No. 8 district, is classified by the complainant, for tariff purposes, as (a) railway fuel, being coal sold to railroad companies; (b) lake-cargo coal, that is, coal intended for shipment by lake to points in the northwest; and (c) commercial coal, comprising coal for commercial and domestic use, not included in the first two classes. * * *

"'It appears that all the coal shipped at the lake-cargo rate remains on the cars of the complainant until unloaded into a vessel, unless it should be diverted en route and devoted to some other purpose, but in that case the lake-cargo rate does not apply. For instance, if it should be diverted to commercial use at Huron, the rate on commercial coal, which is $1 per ton, would govern. * * *

"'All coal thus loaded in vessels is, and must practically be, carried to points in other states, or to Canada. The lake-ports in Ohio receive coal by rail from interior points, but not by boat from other Ohio ports. It might be that a quantity of coal so small as to be negligible is unloaded on one of the Ohio islands in Lake Erie, but no substantial importance is claimed for this circumstance nor could be given to it.'"

225 U. S. pp. 105-6-7.
56 L. ed. p. 1007.

From the very definition of lake-cargo coal, supra, rages on shipments of it, beyond all cavil and dispute, are within the purview of the Interstate Commerce Commission; but what enlightenment does the decision afford the court in the instant case when the distinguishing character, the identifying attribute, of lake-cargo coal is that it is "coal intended for shipment by lake to points in the northwest?" These citations may be dismissed by quoting from the body of the opinion:

"The so-called 'lake-cargo coal' is necessarily shipped beyond Huron. If it stops there, another and higher rate applies. Practically all of it is put on vessels for carriage beyond the state. * * * The situation then

comes to this: That the rate put in force is applicable only to coal which is to be carried from the mine in Ohio to the lake, there placed upon vessels, and thence carried to upper lake ports beyond the state * * *."

225 U. S. 108.
56 L. ed. 1008.

As to the case of United States v. Union Stock Yards of Chicago, 226 U. S. 266, 57 L. ed. 266, cited by plaintiff in error, we concede the soundness of the principles quoted; still it is obvious from the quotations themselves that they must be construed in the light of the facts of that particular case.

To give a comprehensive idea of the principle as enunciated by plaintiff in error in his quotation from this case, same should be read in connection with the words that (in the same paragraph of the opinion) immediately precede it and lead up to it:

"The fact that the performance of the service is distributed among different corporations having common ownership in a holding company which controls an interstate system was held in Southern P. Terminal Co. v. Interstate Commerce Commission, supra, to make no difference where the service to be performed was a part of the carriage of freight by railroad in interstate commerce."

226 U. S. 304; 57 L. ed. 233.

It will be noted that the principle there laid down is predicated on the assumption and admission that the service is in interstate commerce. The gist of the issue in the instant case is: Was

the movement of the shows from Tucson to Phoenix an interstate shipment?

We close our discussion of this case with the court's opinion on the Hepburn Act (34 Stat. at L. 584, par. 1, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1285):

> "It is the manifest purpose of the act to include interstate railroad carriers, and by its terms the act excludes transportation wholly within a state."

226 U. S. 306; 57 L. ed. 234.

Our contention, of course, is that the movement from Tucson to Phoenix is "wholly within the state."

The latest case on this point discussed by plaintiff in error is that of Texas & New Orleans R. R. Co. v. Sabine Tram Co., 227 U. S. 111, 57 L. ed. 442. Justice McKenna, speaking for the court in this case, says:

> "If we may regard the essential character of the shipments, we can have no hesitation in pronouncing them to have been in interstate commerce. This conclusion seems to be determined by the last finding of fact. It is there declared that 'the shipments in controversy, together with other shipments of lumber to Sabine Pass, constitute a large and constantly recurring course of foreign commerce passing out through the port of Sabine.'
> * * *
>
> "That there must be continuity of movement we may conceive, and to a foreign destination intended at the time of the shipment.
> * * *
>
> "Upon the arrival of the lumber at Sabine it was carried without delay beyond and un-

loaded into the water in reach of ship's tackle.

"The determining circumstance is that the shipment of the lumber to Sabine was but a step in its transportation to its real and ultimate destination in foreign countries. In other words, the essential character of the commerce, not its mere accidents, should determine. It was to supply the demand of foreign countries that the lumber was purchased, manufactured, and shipped, and to give it a various character by the steps in its transportation would be extremely artificial. Once admit the principle, and means will be afforded of evading the national control of foreign commerce from points at the seaboard; and if that may be made the point of ultimate destination by the device of separate bills of lading, the commerce will be given local character, though it be essentially foreign.'

227 U. S. pp. 122-4-6.
57 L. ed. pp. 447-8.

In our opinion, the chief value of this citation as applied to the instant case is that portion of Justice McKenna's opinion wherein he distinguishes the case of Gulf C. & S. F. R. Co. v. Texas, 204 U. S. 403, 51 L. ed. 540. The facts of this latter case, as set out by Justice McKenna in the Sabine Tram Co case (227 U. S. at p. 128, 57 L. ed. 449) were as follows:

"The Hardin Grain Company, doing business in Kansas City, Missouri, having made a contract with parties at Goldthwaite, Texas, for the delivery of two carloads of corn at that place, in order to comply with their undertaking, contracted to purchase of the

Harroun Commission Company, who were also doing business at Kansas City, Missouri, and had an agent at Texarkana, Texas, and same quantity of corn, to be delivered at the latter point. The corn with which the Harroun Commission Company proposed to fulfill their contract was shipped from South Dakota to Texarkana, Texas, through Kansas City, Missouri. It was delivered to Texarkana, Texas, in accordance with the agreement, to the Hardin Grain Company, who thereupon shipped it in the same cars, without breaking bulk, over the Texas & Pacific Railway and its connecting lines to Goldthwaite, Texas."

Of all the cases discussed or cited by plaintiff in error, we believe this court will agree that the Gulf C. & S. F. R. Co. case, supra, is the most opposite and controlling in the instant case. In the Gulf Coast case the transportation involved is an entirely INLAND shipment (as is the movement from Tucson to Phoenix), whereas, in all of the other cases, supra (with the exception of the Stock Yards case), the significant fact of shipment to or via a water port situated on the boundary line of a state was the deciding factor in determining that the shipment in question was, in fact and under the law, an interstate shipment.

The Stock Yards case was purely and simply a decision to the effect that a stock yards company owning a railroad connecting with other carriers operating in interstate commerce, and carrying concededly interstate shipments, is an interstate railway carrier, and the decision is only remotely, if at all, applicable to the instant case.

The United States Supreme Court, in the Gulf C. & S. F. R. Co. case, found that the shipment

from Texarkana, Texas, to Goldthwaite, Texas, was a local shipment, and, contrary to the contention of plaintiff in error not an interstate shipment.

The court in that case, speaking through Justice Brewer (204 U. S. 403), said:

> "It is undoubtedly true that the character of a shipment, whether local or interstate, is not changed by a transfer of title during the transportation. But whether it be one or the other may depend upon the contract of shipment."

The contract of shipment solicited, obtained, and the subject of consideration in the instant case covered movement from Tucson, Arizona, to Phoenix, Arizona, and no farther.

> "The control over goods in process of transportation, which may be repeatedly changed by sales, is one thing; the transportation is another thing, and follows the contract of shipment, until that is changed by the agreement of owner and carrier. * * * The carrier was under no obligations to carry it farther."

In the face of the foregoing, can it be seriously contended that the movement from Tucson, Arizona, to Phoenix, Arizona, was an interstate shipment?

It is our insistence that the status of the grain shipment on and after arrival at Texarkana is exactly that of Campbell's United Shows on and after the latter's arrival at Tucson; and, indeed, after arrival of the show at Phoenix, Arizona, under the contract of shipment, in the language of Justice Brewer, supra, "The carrier was under no obligations to carry it farther."

"The one contract of the railroad companies having been finished, he must make a new contract for his carriage to Goldthwaite, and that would be subject to the law of the state within which that carriage was to be made."

So, in the instant case, the contract transportation of the show to Tucson having been completed, the show must make a new contract for its carriage to Phoenix, and that "would be subject to the law of the state (Arizona) within which that carriage was to be made."

Arizona, pursuant to the provisions of its constitution, through the legislature, has vested its Corporation Commission with power, nay, the duty, to *regulate* this movement of Campbell's United Shows from Tucson to Phoenix, is our contention.

Our contention is that in the case of a common carrier operating as a private carrier, the constitution plainly and fully authorized the Corporation Commission to *regulate* such common carrier operating as such private carrier, and that just so long as the Corporation Commission does not interfere with or impair the *common law liability* of a carrier when operating as a private carrier, there is no cause for complaint.

CONCLUSION

In conclusion we desire to state that we believe that we have shown in the foregoing pages that the Supreme Court of the state of Arizona did not err,

First. In holding that the Commission had power to order the Southern Pacific Company to

SOUTHERN PACIFIC COMPANY *v.* STATE OF ARIZONA.

ERROR TO THE SUPREME COURT OF THE STATE OF ARIZONA.

No. 238. Submitted March 13, 1919.—Decided April 14, 1919.

Whether a shipment was at a given time interstate is a question of fact. P. 477.

Evidence *held* insufficient to prove that a traveling show was moving interstate, at the time of proceedings before a state commission, to require transportation within the State and fix the rate. *Id.*

The mere intention to continue the tour of a traveling show beyond the State where it was performing, *held* not enough to give interstate character to a contemplated journey within the State. *Id.*

A claim of federal right which was not set up in the state court and made in the assignments of error *held* not open in this court. P. 478.

Semble, that when required by a state commission to transport a

traveling show at a rate which is not objected to and upon terms the same as it has habitually and voluntarily agreed to in like cases, a railroad company has no ground to complain that it is thus deprived of its liberty to make or refuse a contract as a private carrier, in violation of the equal protection and due process clauses of the Fourteenth Amendment. P 478.

19 Arizona, 20, affirmed.

THE case is stated in the opinion.

Mr. C. W. Durbrow, *Mr. Henley C. Booth* and *Mr. Wm. F. Herrin* for plaintiff in error, in support of the contention that the movement was interstate, cited *South Covington Ry. Co.* v. *Covington*, 235 U. S. 537, 545; *United States* v. *Union Stock Yards of Chicago*, 226 U. S. 266, 304; *Missouri, Kansas & Texas Ry. Co.* v. *Texas*, 245 U. S. 484; *Western Oil Refining Co.* v. *Lipscomb*, 244 U. S. 346, 348.

In support of the contention that the right of private contract was invaded, in violation of the Fourteenth Amendment,—*Chicago, Rock Island & Pacific Ry. Co.* v. *Maucher*, 248 U. S. 359; *Santa Fe, Prescott & Phoenix Ry. Co.* v. *Grant Brothers Construction Co.*, 228 U. S. 177; *Baltimore & Ohio S. W. Ry. Co.* v. *Voigt*, 176 U. S. 498; *Wilson* v. *Atlantic Coast Line*, 129 Fed. Rep. 774; affd. 133 Fed. Rep. 1022; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Wallace*, 66 Fed. Rep. 506; *Cluff* v. *Grand Trunk Western Ry. Co.*, 155 Fed. Rep. 81; 1 Hutchinson on Carriers, 3d ed., § 88; Moore on Carriers, § 38, pp. 79, 80.

It is not necessary in order to render an order or a statute obnoxious to the Federal Constitution that it in terms or in effect authorize the actual physical taking of the property or the thing itself, so long as it affects its free use and enjoyment or the power of disposition at the will of the owner. *Forster* v. *Scott*, 136 N. Y. 577; *Monongahela Navigation Co.* v. *United States*, 148 U. S. 336.

Mr. Wiley E. Jones, Attorney General of the State of Arizona, for defendant in error.

MR. JUSTICE CLARKE delivered the opinion of the court.

An agent for Campbell's United Shows applied to the Southern Pacific Company to transport eighteen cars, carrying a carnival show equipment, including employees and animals, from Tucson via Maricopa, to Phœnix, Arizona.

In reply to this application the company gave two reasons for refusing the request. The first of these was that the company had contracted for the transportation of another show, under an agreement not to carry a second one within thirty days, which had not expired; and the second, that the company was not a common carrier of shows and would not make the customary contract with Campbell, but would serve him only at certain published interstate rates, which it regarded as applicable. These were many times greater than had been charged for the same show and than had been the customary charge by the Southern Pacific and other companies for similar service.

Upon receiving this refusal, an application by the owner of the shows to the Arizona Corporation Commission for relief, resulted in an order to the Southern Pacific Company and the Arizona Eastern Railroad Company, operating a connecting line, to show cause why they should not publish, on one day's notice, a special rate, designated in the order of the commission, for the transportation of the shows between the points named. The reasonableness of the required rate is not contested, and the order permitted the Southern Pacific Company to make the special terms for transportation of the shows which had been customary with it in like cases.

The company refused to obey the order and the commission issued to it a second rule to show cause why it should not be punished for contempt for such disobedience. On this second rule a hearing was had, and the company was adjudged in contempt and fined $1500, which it refused to pay.

Thereupon the State of Arizona instituted this suit in a superior court of that State to recover the amount of the fine.

In its answer to the complaint of the State, the Southern Pacific Company alleged:

That the proposed movement of the shows was "interstate in character" because they were engaged in a tour, beginning at the City of El Paso, Texas, and designed to extend through the States of Arizona and New Mexico into the State of California, of which tour the movement from Tucson to Phœnix was a part; that in its necessary operation the order would require the company to accept a rate lower than its published interstate rate and would be a direct burden upon interstate commerce; and that, for these reasons, the order for the transportation was in contravention of the provisions of Article I, § 8, of the Constitution of the United States, and the fine for contempt was unlawfully imposed and void.

The judgment of the superior court was in favor of the State, the company appealed to the Supreme Court of Arizona, which affirmed the judgment, and the case is here on writ of error.

The only claim of error argued in this court which is properly presented by the record is: Whether the persons and property which the commission ordered the railroad company to carry were in interstate transportation when the order was made for the service between two stations in Arizona. If the shipment was then in interstate commerce the order was void, and if

it was not the order was valid and the judgment of the Supreme Court of Arizona must be affirmed.

The evidence which was before the courts and the commission was as follows:

Early in February, 1914, an agent for the shows applied to the Southern Pacific Company for their transportation from El Paso, Texas, to various towns in Arizona where it was desired to exhibit, and ultimately to Cochise, Arizona, from which point another line would be taken into Tucson. Nothing came of this application and an arrangement was made for carriage to Tucson by another road. Before the shows arrived at Tucson the application out of which this suit arose was made. The agent for the shows testified that the tentative purpose of the management was to go from Tucson to Prescott, to Clarkdale, to Kingman, all in Arizona, and then to Needles, California, exhibiting in each town, but when testifying on March 23rd, when his show was exhibiting in Tucson, he said that although he had made application to the Santa Fe Railroad Company for a contract for transportation beyond Phœnix, he had not at that time received a reply.

The agent for the Santa Fe Company at Phœnix testified that about March 20th an application was made to him for a rate and contract for the transportation of the shows over his line from Phœnix to Prescott, "possibly to Clarkdale and to Needles, California."

Two contracts with the Santa Fe Company were introduced in evidence, one dated April 3rd, providing for the transportation of the shows from Phœnix to Prescott, to Kingman and to Needles, and the other dated April 16th, providing for transportation from Prescott direct to Bakersfield, California.

The shows were actually carried by the Southern Pacific Company on March 29th or 30th from Tucson to Phœnix but at an interstate rate insisted upon in

defiance of the commission's order. At Phœnix the transportation ended so far as the Southern Pacific Company was concerned, and the contract with the Santa Fe Company to carry the shows beyond that city was not concluded, as we have seen, until April 3rd—in its modified form not until April 16th.

This statement of the case decides it. Whether a shipment was at a given time in interstate commerce is a question of fact, *Railroad Commission of Ohio* v. *Worthington*, 225 U. S. 101, 108; and it is plainly impossible to say that the property and persons constituting the shipment of the shows here involved were in progress of interstate transportation when the Arizona commission entered its order on March 25 that the company should accept the intrastate shipment from Tucson to Phœnix. For at that time the shows were in the exclusive possession and control of the owner, exhibiting for six days at Tucson, and the application to the Southern Pacific Company, which was refused, shows, incontrovertibly, that the transportation to Tucson had terminated, and that no other transportation had then been contracted for. The company itself proved that interstate transportation was not subsequently arranged for until April 3rd certainly—and probably not until April 16th—and then was via another line from Phœnix, after two weeks for exhibition in that city.

The mere intention of the shipper to ultimately continue his tour beyond the State of Arizona did not convert the contemplated intrastate movement into one that was interstate. The case is ruled by *Coe* v. *Errol*, 116 U. S. 517; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Iowa*, 233 U. S. 334; *Gulf, Colorado & Santa Fe R. R. Co.* v. *Texas*, 204 U. S. 403; *Arkadelphia Milling Co.* v. *St. Louis Southwestern Ry. Co.*, *ante*, 134.

It is further argued by the plaintiff in error that the

order of the state commission deprived it of its right to make or refuse to make a contract as a private carrier for the transportation of traveling shows, and thereby deprived it of the equal protection of the laws and of its property without due process of law.

It would be enough to say of this contention that no such claim was asserted in the answer of the company in the state court, or even in the assignments of error in this court, and that, therefore, it cannot be considered here. But this omission is not an oversight, for the record shows that it had been the prior practice of the plaintiff in error to transport such shows on application under special contract—a short time before it had transported another show and the year before it had accepted these same shows for transportation—and that the order of the commission was: "It is understood . . . that the . . . company may enter into a contract covering this transportation, the terms of which shall not be in substantial variance with the contract now existing between the Arizona Eastern Railroad Company and Sells-Floto Shows Company, with respect to details, as to responsibility, service, and conditions," which contract was on file with the commission, and was dated March 4, 1914. This form of contract was one also used by the Southern Pacific Company.

Thus this second claim, obviously an afterthought, is so clearly without merit that it cannot be considered, and the judgment of the Supreme Court of Arizona is

Affirmed.